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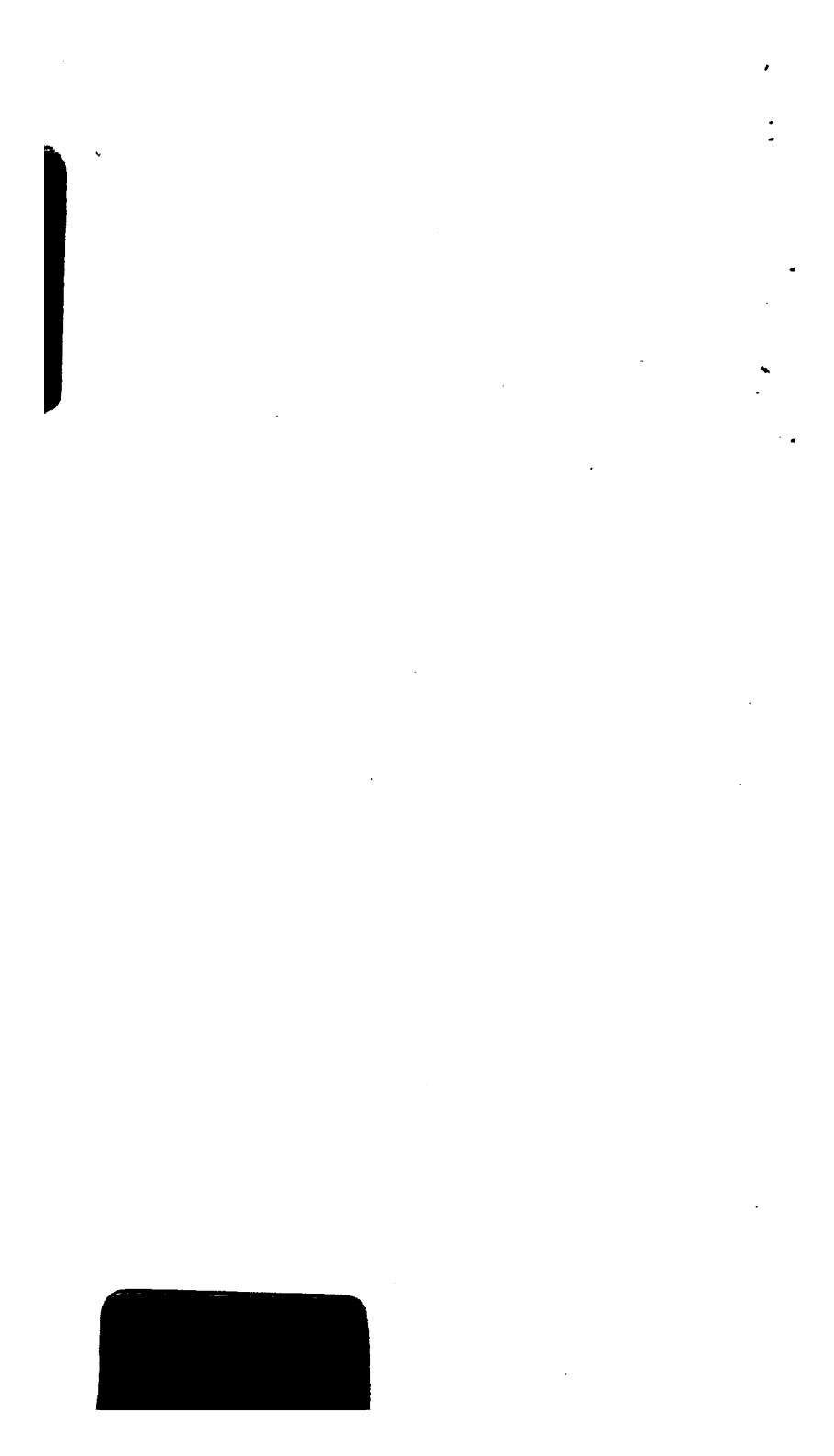
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HISTORY
OF
A SUIT IN EQUITY

AS PROSECUTED AND DEFENDED

IN THE

Virginia State Courts

AND IN THE

UNITED STATES CIRCUIT COURTS;

WITH AN

APPENDIX,

EMBRACING, AMONG OTHER MATTERS, FORMS
OF BILLS, ANSWERS, DEMURRERS,
PLEAS, DECREES, ETC.

BY

ALEXANDER H. SANDS.

RICHMOND, VA.

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TO
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THIS WORK

IS RESPECTFULLY INSCRIBED;

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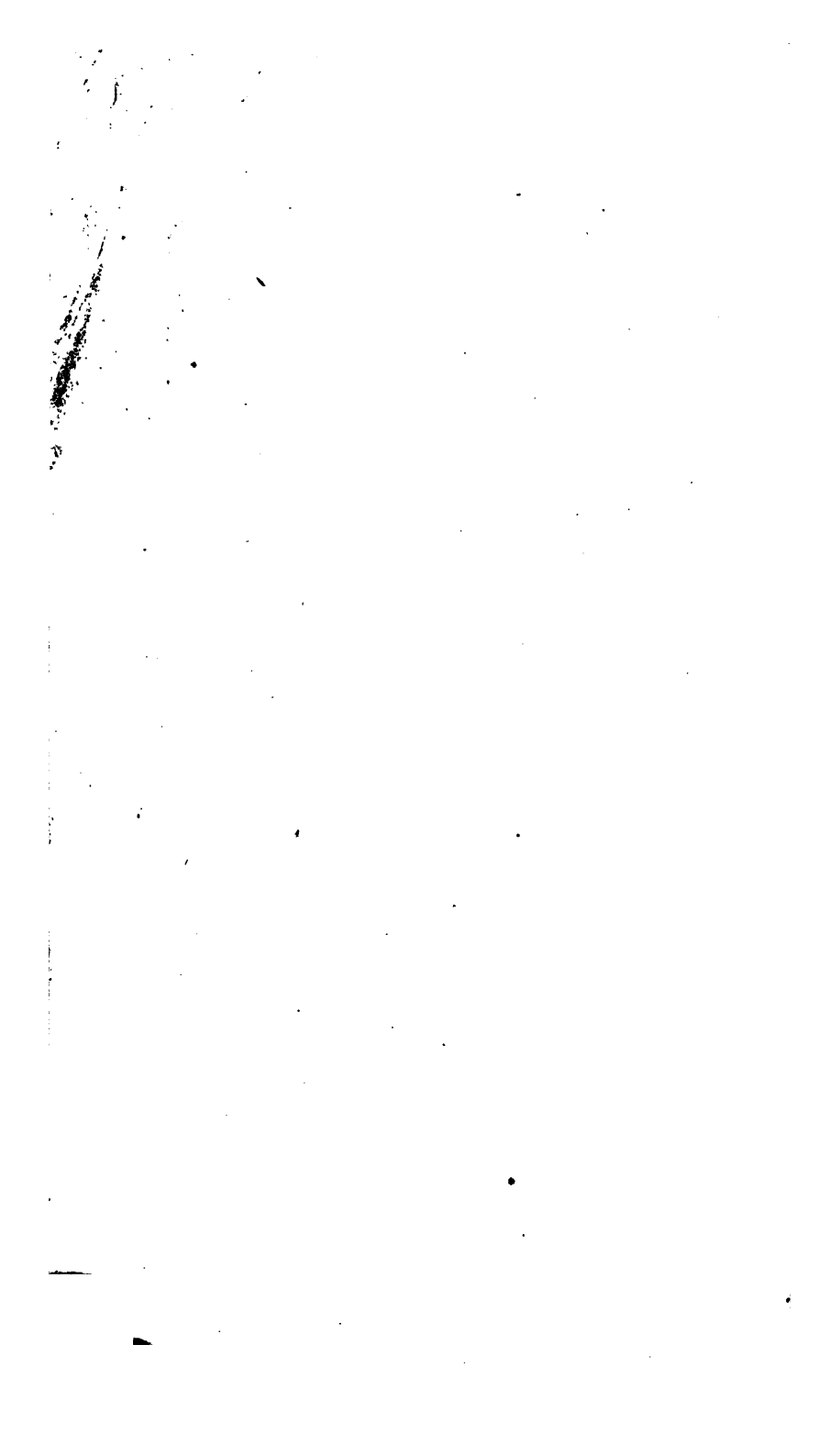
HIS EMINENT TALENTS AND

PROFOUND LEARNING

AS A JURIST;

AND HIS NOBLE QUALITIES

AS A MAN.



PREFACE.

I undertook this work because I believed the young men of the legal profession desired a handbook to guide them in the prosecution and defence of Suits in Equity.

The matter of the volume has been prepared and arranged with especial reference to this object.

In the first book, I have traced the History of a Suit in Equity, from its beginning, through its various stages, to a final decree; in this general review, merely referring incidentally to such proceedings as do not necessarily enter into every suit. In the second book, I have treated at length of these Proceedings, and also of the Proceedings subsequent to a Decree, of Interlocutory Applications, and other matters not embraced in the first.

The Appendix contains a variety of Forms of Pleadings in Equity, some of which have been selected from published volumes of precedents, others were written for this work, and others again are copies of Equity Pleadings actually used in the progress of causes in the Circuit Court of Richmond, and in the United States Circuit Court held in this city. The Appendix

also contains a Summary of the more important decisions affecting questions of Equity Practice and Pleading, made by the Court of Appeals of Virginia and by the Supreme Court of the United States.

I take pleasure in acknowledging my indebtedness to Mr. Richard Milton Cary, Deputy Clerk of the Richmond Circuit Court, as well as to Mr. Philip Mayo, Clerk of the United States Circuit Court held in this city, for the kind aid they have rendered me, in furnishing copies of Pleadings and Decrees in their respective Courts, which have been used as the basis of many of the Forms contained in this volume.

A. H. SANDS.

Richmond, April 15th, 1854.

INTRODUCTION.

The general rule laid down in the books in relation to the Jurisdiction of Equity Courts, is to the effect that these Courts will always entertain jurisdiction in cases of rights recognized and protected by the municipal jurisprudence, where a plain, adequate, and complete remedy cannot be had in Courts of Common Law. The line of jurisdiction embraced by this rule cannot be drawn with entire precision, and the attempt to define its exact limits will not be made here; but it may be proper to state that there are many cases in which a party, now having a full and complete remedy at Law, may yet obtain relief of a Court of Equity. These are cases, in which originally such relief was not afforded by Courts of Common Law; and the jurisdiction having once attached in Equity for want of a remedy at Law, it remains there until taken away by positive statutes. Thus, in the Virginia State Courts, though a party in an action at law may compel a discovery from the defendant in answer to interrogatories as to such matters as he may properly inquire into,¹ yet Courts of Equity will entertain jurisdiction of a bill of discovery filed for the purpose of compelling discovery in such a case.

The subjects of Equity Jurisdiction have been classified in a variety of methods. Mr. Maddox adopts in his treatise the following classification: 1st, Accident and mistake; 2d, Account; 3d, Fraud; 4th, Infants; 5th, Specific performance of agreements; and, 6th, Trusts. Lord Coke had previously enumerated the subjects of Equity Jurisdiction as "matters of fraud, accident, and trust." Neither of these

¹ See Code of Virginia, chap. 176, sections 38, 39, 40.

divisions embraces classes of subjects which form no small part of the business of Equity Courts; as for example, the remedies by the writ of injunction, ne exeat, and the like, and by bill of discovery, mentioned before. The classification of Mr. Fonblanque is more generally approved of, and seems to be much more accurate and comprehensive. That writer divides the jurisdiction of Equity Courts into three classes: 1st, The jurisdiction which they exercise concurrent with Courts of Common Law; 2d, Their jurisdiction auxiliary to Courts of Law; and, 3d, Their exclusive jurisdiction. This division is adopted by Justice Story. His Treatise on Equity Jurisprudence is in the hands of every student, and to that the reader is referred for the filling up of the outline here marked out.

Equity does not entertain jurisdiction over Criminal Proceedings, save that under special circumstances it will restrain a public nuisance. In all other matters, criminal cognizance is restricted to Courts of Common Law.

There is a peculiarity attending Pleadings in Equity which deserves to be particularly noted at the threshold of this work. It is this: in Courts of Common Law, the immediate parties to the action are not always the only parties interested in the issue; indeed, in many cases, they are less interested than others who are not parties, and cannot properly be made such. In Equity, however, this is not the case. There, as a general rule, all persons materially interested in the subject should be parties to the suit, either as plaintiffs or defendants.² And so, also, in the arrangement of parties plaintiff

² This general rule admits of exception in the following, among other, cases: 1st. When the necessary parties are unknown, and the bill itself seeks a discovery of them. 2d. When a person who would ordinarily be a party is beyond the jurisdiction of the Court, provided that no decree is sought which would prejudice his rights; and that the merits of the controversy can be fully ascertained without his presence. 3d. When the parties are so numerous that it would be extremely inconvenient to unite them in one suit;—this latter class ad-

and defendant there is a farther difference between actions at Law and suits in Equity. In the former, the same reason which requires that the immediate disputants be the only parties at law, also requires their arrangement to be such that all the plaintiffs shall support one side, and all the defendants

mitting of several subdivisions: (1.) Where the question is one of common interest, and one or more sue or defend for the benefit of the whole, as in the case of the creditors of a deceased debtor, when one or more may sue on their own behalf and that of the remaining creditors. (2.) Where the parties form a voluntary association for private or public purposes, and those who sue or defend may be fairly presumed to represent the rights and interests of the whole. (3.) Where the parties are so numerous that it would be impracticable to bring them all before the Court, although they have separate and distinct interests. Barton's Suit in Equity by Holcombe, 47. See on the subject of Parties, 1 Dan. Ch. Pr.; Story's Equity Pleadings; Calvert on Parties; also Rules of United States Supreme Court, published in Appendix to this volume.

NOTE.—It is a general rule, subject to very few exceptions, that there is no sort or condition of persons but may sue in Courts of Equity. The exceptions are as follows: For mere personal demands an alien may institute a suit in these Courts, provided he be not an alien enemy; (see 1 Pet. C. C. R. 106;) but it is clear that an alien, having no right to acquire real property, would not be entitled to sue in Equity to establish such right. It may be a matter of question whether an outlaw could institute a suit in Equity in the Virginia State Courts or in the United States Courts. In the Virginia State Courts the weight of the positive statutes of the State in regard to outlawry would seem to favor the institution of a suit, either by himself or another; but it is possible that public policy would inhibit him, or another for him from asserting any claim in a court of justice, and the Courts might so determine. The question has not been settled, and this intimation of its probable issue is expressed with many misgivings as to the result. There are other exceptions to the general rule above noted. These are persons who, though not prevented from suing, are incapacitated from suing alone, as infants, idiots, persons of weak minds, or imbeciles, and married women. Infants, and in most cases, married women, assert their rights in Courts of Equity by a *next friend*, who usually is a relative, but not necessarily such. Married women may sometimes assert their rights in their own names and alone; but these cases are rare. For the assertion of rights on behalf of lunatics, persons of weak minds, or imbeciles, their committees should institute suit. The committees of convicts in the State of Virginia also sue, instead of the convicts themselves.

the other side of the question in issue. In Equity, it is only requisite that the interests of the plaintiffs be consistent, and it is immaterial that the defendants are in conflict with each other, or that some of their claims are identical with those of the plaintiffs.³

Equitable jurisdiction is, in England, chiefly exercised by the Court of Chancery.

The United States Circuit Courts exercise all the original jurisdiction in Equity causes, with which the Federal Courts of the Union are invested by the Federal Constitution. (See 11th section of Act of Congress, September 24th, 1789.) These Courts entertain original jurisdiction concurrent with the Courts of the several States, of all suits in Equity, where the matter in dispute, exclusive of costs, amounts to the sum or value of five hundred dollars, and the United States are plaintiffs, or an alien is a party, or the suit is between a citizen of the State in which the suit is brought and the citizen of another State. (See 11th section of Act of Congress of September 24th, 1789.⁴) These Courts, also, entertain jurisdiction in all cases, brought under the laws of the United States, granting to authors or inventors the benefit of their writings or inventions.

In the State of Virginia, original Equity jurisdiction is exercised by the County and Corporation Courts, and by the Circuit Courts of the State. The Circuit Courts have original jurisdiction concurrent with the County or Corporation Courts in all Equity causes,⁵ and, besides, there are cases especially committed to the charge of the Circuit Courts, such as bills for divorce,[†] and the sale of lands of persons under disability under the 128th chapter of the Code of Virginia. The

³ Adams's Equity, 312.

⁴ This act provides that such suits, if first instituted in the State Courts, may be removed therefrom to the United States Circuit Courts, upon petition. See 12th section of Act, Story's Laws U. S., vol. 1, p. 27.

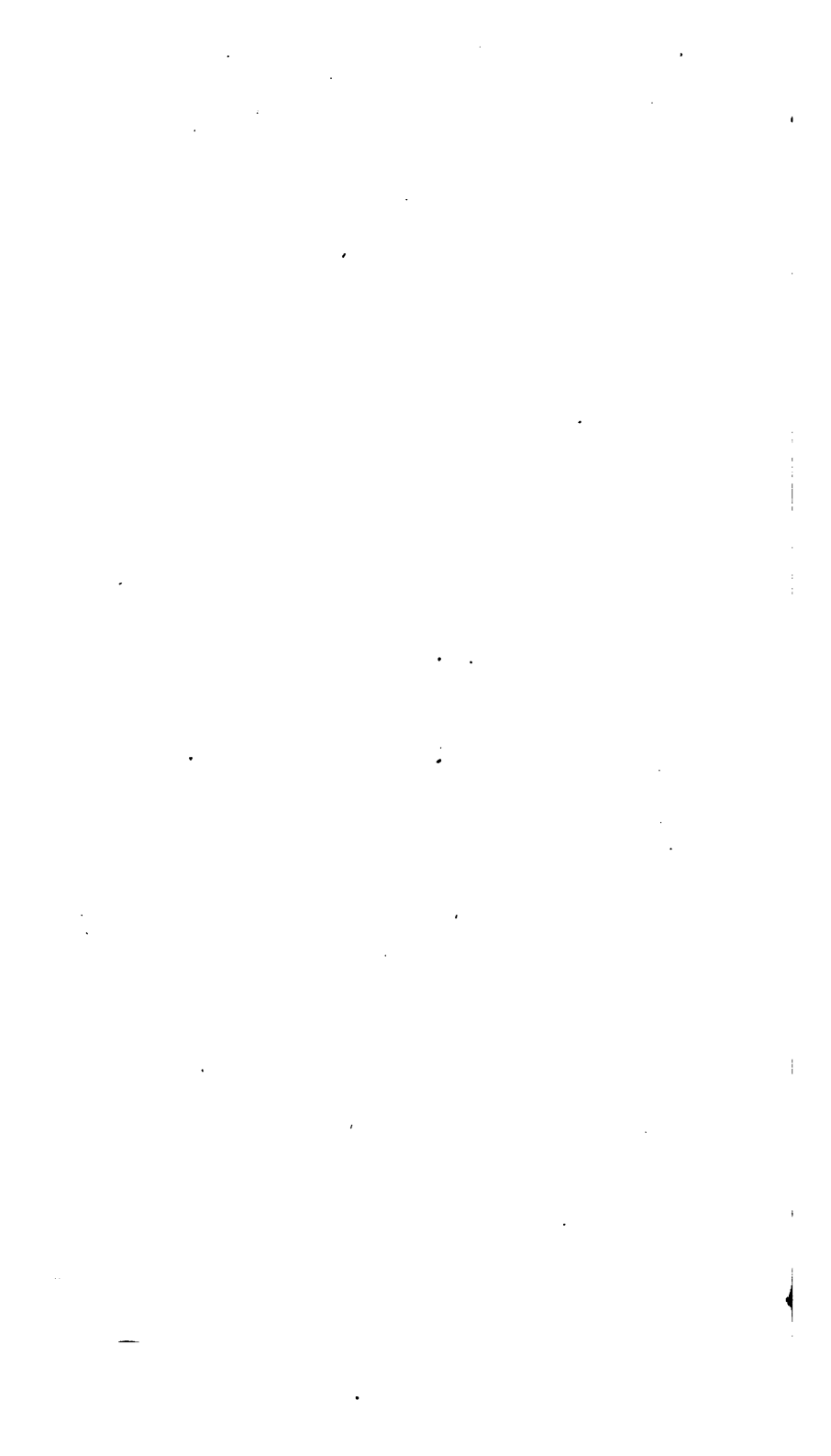
⁵ Code of Virginia, chap. 128, sec. 3.

[†] Ibid. chap. 109, sec. 8.

County and Corporation Courts have original jurisdiction in all causes in Equity, except in causes to recover property or money, not of greater value or amount than twenty dollars, and except such cases as are by law specially assigned to some other tribunal.⁶

The Appellate Jurisdiction of these several tribunals will be treated of in the chapter on Appeals in the subsequent Volume.

⁶ Code of Virginia, chap. 127, sec. 3.



SUIT IN EQUITY.

BOOK I.

CHAPTER I.

*Of Commencement of Suit in Virginia State Courts;
and of the Rules and Proceedings in the Clerk's
Office in these Courts anterior to filing of Bill or
Information.*

HOW SUITS INSTITUTED.

§ 1. In England, it is the practice to institute suits in equity by first filing the bill or information: a bill, when the claim preferred is on behalf of a subject; an information, when exhibited on behalf of the crown. Here, the practice is somewhat different. Ordinarily,* suits in equity are begun in the Virginia State Courts in like manner with actions at law, by placing with the clerk of the court in which the suit is instituted a memorandum setting forth the names of the parties complainant and defendant, and directing a summons¹ to issue,

* As to injunction bills, writs of *ne exeat*, and suits instituted in United States Circuit Courts, see subsequent chapters of this work.

¹ Formerly the writ used was a *subpoena*. The Code of Virginia has substituted in place of the subpoena the writ of summons.—Chap. 170, sec. 5.

returnable within ninety days after its date, to some rule day or to the first day of next term of the court. This memorandum is as follows:

To the Clerk of the — Court for the City (or County)
of —:

A. B. and C. D., - - - Plaintiffs,
against

R. H. and J. W., - - - **Defendants.**

Issue summons in Chancery to — rules, (*or*, to the first day of the next term of the court.)

G. M., p. q.

§2. Upon the filing of this memorandum, the clerk will issue a summons in conformity to its directions. This summons is as follows:²

The Commonwealth of Virginia,

To the Sheriff of ——— County, greeting:

You are hereby commanded to summon R. H. and J. W. to appear at the clerk's office of our circuit court of the city (or county) of —, at the rules to be holden for the said court, on the first Monday in — next, to answer a bill in chancery, exhibited against them in the said court by A. B. & C. D. And have then there this writ.

Witness, J. E., Clerk of our said court, at — the
— day of —, 18—; and in the — year of the
Commonwealth.

J. E., Clerk.

² In England, if a defendant be a peer of the realm or entitled to the privilege of peerage, he has a right, before a subpoena is issued against him, to be informed by letter from the lord chancellor of the bill having been filed; this letter is called a letter missive, and must be accompanied by a copy of the bill. Here there is no difference in the character of the process, whatever the office and position the defendant holds.

§ 3. The summons may be executed on or before the return day by delivering copies to each of the defendants.³ It may be served by an officer or by another person. When served by an officer, his return thereon that "the within summons has been executed by delivering a copy of the same to each of the parties defendant" will suffice;⁴ when served by another person, an affidavit of the service is required.⁵

§ 4. If a party defendant be not found at his usual place of abode, the summons may be executed by delivering a copy and giving information of its purport, to his wife, or any white person found there, who is a member of his family and above the age of sixteen years; or, if neither he nor his wife, nor any such white person, be found there, by leaving a copy of the summons posted at the front door of his abode.⁶

§ 5. The Code of Virginia, chap. 170, sec. 7, prescribes the mode of service of summons upon a corporation as follows: "It shall be sufficient to serve any process against, or notice to a corporation, on its mayor, rector, president, or other chief officer, or in his absence from the county or corporation in which he resides, or in which is the principal office of the corporation, against or to which the process or notice is, if it be a city or town, on the president of the council or board of trustees, or in his absence, on the recorder or any

³ The service of the summons against husband and wife on husband alone is ordinarily a good service; 2 John. Ch. Rep. 139, but where the plaintiff is seeking satisfaction out of the separate estate of wife, there should be separate service upon her.

⁴ See Code of Virginia, chap. 170, sec. 2.

⁵ Ibid., chap. 170, sec. 6, and chap 167, sec. 1.

⁶ Ibid., chap. 167, sec. 1.

alderman or trustee; and if it be not a city or town, on the cashier or treasurer; and if there be none such, or he be absent, on a member of the board of directors, trustees or visitors. If the case be against a bank of circulation, and be in a county or corporation wherein the bank has a branch, service on the president or cashier of such branch bank shall be sufficient; and if the case be against some other corporation than a bank and there be not in the county or corporation wherein it is commenced, any other person on whom there can be service as aforesaid, service on an agent of the corporation against which the case is, and publication of a copy of the process or notice as an order is published under the eleventh section of this chapter, shall together be sufficient. Service on any person under this section, shall be in the county or corporation in which he resides; and the return shall shew this, and state on whom and when the service was, otherwise the service shall not be valid."

§ 6. The rules are opened in the clerk's office on the first Monday in every month, except when a term of a circuit court or a quarterly term of a county or corporation court commences on that day, or either of the two following days, or on the preceding Thursday, Friday and Saturday; in either of which ~~courts~~ the rules will be held on the last Monday in the next preceding month. The rules may continue open three days. At the rules all steps are taken necessary to mature the suit for the hearing of the court, and it not unfrequently happens that an end is here put to a suit in the clerk's office before it has come under the eye of the court.

§ 7. Thus, the plaintiff may dismiss his suit at the rules: or by his neglect he may incur a dismissal, or

the suit may abate at rules by operation of law: or the defendant may confess a decree in the clerk's office for so much principal and interest as the plaintiff may be willing to accept a decree for.⁷

WHEN SUIT DISMISSED AT RULES.

§ 8. A defendant may appear at the rules, at which the process against him is returnable, or if it be returnable in term, at the first rule day after the return day, and if the bill be not then filed, may give a rule for the plaintiff to file the same. If the plaintiff fail to file his bill at the succeeding rule day, after a rule has been given him by a party defendant to file it, he will be non-suited and required to pay the defendant five dollars beside his costs.⁸

§ 9. If the plaintiff suffer three months to elapse after the summons is returned executed as to any one or more of the defendants, without filing his bill, the clerk will enter his suit dismissed, although none of the defendants may have appeared.⁹

WHEN SUIT ABATES AT RULES.

§ 10. When a summons to answer a bill is against a defendant, whom the officer (receiving it) knows not to reside in his county or corporation, the officer, unless he find him therein before the return day, should return him a non-resident; and if the court has jurisdiction simply on the ground of such defendant's residence in the county or corporation, the suit will abate as to that defendant.¹⁰

⁷ Code of Va., chap. 171, sec. 41.

⁸ Ibid., chap. 171, sec. 5.

⁹ Ibid., chap. 171, sec. 6.

¹⁰ Ibid., chap. 171, sec. 7.

CHAPTER II.

Of the several kinds of Bills; of the matter and form of Bills, and of Informations.

SEVERAL KINDS OF BILLS.

§ 11. The several kinds of bills have been usually considered as capable of being arranged under three general heads. *First.* Original bills, which relate to some matter not before litigated in the court by the same persons standing in the same interests. *Second.* Bills not original, which are either an addition to, or a continuance of, an original bill, or both. *Third.* Bills, which though occasioned by or seeking the benefit of a former bill or of a decision, made upon it, or attempting to obtain a reversal of a decision, are not considered as a continuance of the former bill, but in the nature of original bills. And though this arrangement is not perhaps the most perfect, yet, as it is nearly just, and has been very generally adopted in argument and in the books of reports and of practice, it will be convenient to treat of the different kinds of bills with reference to it.

§ 12. *First.* A bill may pray relief against an injury suffered, or only seek the assistance of the court to enable the plaintiff to defend himself against a possible future injury, or to support or defend a suit in a court of ordinary jurisdiction. Original bills have, therefore,

been again divided into bills praying relief, and bills not praying relief. An original bill praying relief may be, 1. A bill praying the decree or order of the court touching some right claimed by the person exhibiting the bill, in opposition to some right claimed by the person against whom the bill is exhibited. 2. A bill of interpleader, where the person exhibiting the bill claims no right in opposition to the rights claimed by the persons against whom the bill is exhibited, but prays the decree of the court touching the rights of those persons, for the safety of the person exhibiting the bill. 3. A bill praying the writ of *certiorari*¹ to remove a cause from an inferior court of equity. An original bill not praying relief may be, 1. A bill to perpetuate the testimony of witnesses. 2. A bill for discovery of facts resting within the knowledge of the person against whom the bill is exhibited, or of deeds, writings or other things in his custody or power.

§ 13. *Second.* A suit imperfect in its frame, or become so by accident before its end has been obtained, may in many cases be rendered perfect by a new bill, which is not considered as an original bill, but merely as an addition to, or a continuance of, the former bill, or both. A bill of this kind may be, 1. A supplemental bill, which is merely an addition to the original bill. 2. A bill of revivor, which is a continuance of the original bill, when by death some party to it has become incapable of prosecuting or defending a suit, or a female plaintiff has by marriage incapacitated herself from suing alone.² 3. A bill both of revivor and supple-

¹ This bill is rarely, if ever, used in America, and is not of very frequent occurrence in England.

² Bills of revivor simply are very rare in Virginia. Suits are revived here, by the writ of *scire facias*, when the party who dies, or, if a

ment, which continues a suit upon an abatement, and supplies defects arisen from some event subsequent to the institution of the suit.

§ 14. *Third.* Bills for the purposes of cross litigation of matters already depending before the court, of controverting, suspending, avoiding, or carrying into execution a judgment of the court, or of obtaining the benefit of a suit which the plaintiff is not entitled to add to or continue for the purpose of supplying any defects in it, have been generally considered under the head of bills in the nature of original bills, though occasioned by or seeking the benefit of former bills; and may be, 1. A cross bill exhibited by the defendant in a former bill against the plaintiff in the same bill, touching some matter in litigation in the first bill. 2. A bill of review to examine and reverse a decree made upon a former bill. 3. A bill in the nature of a bill of review, brought by the person not bound by the former decree. 4. A bill to impeach a decree upon the ground of fraud. 5. A bill to suspend the operation of a decree on special circumstances, or to avoid it on the ground of matter arisen subsequent to it. 6. A bill to carry a decree made in a former suit into execution. 7. A bill in the nature of a bill of revivor, to obtain the benefit of a suit after abatement in certain cases which do not admit of a continuance of the original bill. 8. A bill in the nature of a supplemental bill, to obtain the benefit of a suit, either after abatement in other cases which do not admit of a continuance of the original bill, or

female that marries, is a defendant—when the party who dies or female marrying is a plaintiff, the person or persons for whom a *scire facias* might be sued out may, without notice or *scire facias*, move that the suit proceed in his or their name.—See Code of Virginia, chap. 173, sec. 3.

after the suit is become defective without abatement in cases which do not admit of a supplemental bill to supply that defect.*

MATTER OF BILL.

§ 15. Every bill should state the right, title or claim of the plaintiff with accuracy and clearness; and should, in like manner, state the injury or grievance of which he complains and the relief which he asks of the court.³

§ 16. Every fact essential to the plaintiff's title to maintain the bill and obtain the relief must be stated in the bill, otherwise the defect will be fatal; no facts are properly in issue unless charged in the bill.⁴

§ 17. The bill must show sufficient matters of fact *per se* to maintain the case, and if it be defective in this the bill will be dismissed.⁵ This rule has been carried to the extent that if several persons join in filing a bill and it appears that one of them has no interest, the bill will be open to demurrer though it appear that all the other plaintiffs have an interest in the matter and a right to institute a suit concerning it.⁶

§ 18. In all cases the bill must show that the parties defendant are in some way liable to the plaintiff's demand,⁷ or that they have some interest in the subject of the suit,⁸ and it must further show that there is such a privity between the parties defendant and the plaintiff as entitles him to sue them.⁹

§ 19. Care should be taken not to attempt to embrace in the same bill too many objects. It is a rule of Equity

* The foregoing part of this chapter has, with some modifications, been taken from the text of Lord Redesdale.

³ Story's Eq. Plea., 234.

⁴ Ibid., 295.

⁵ Mitf. Plea., 125.

⁶ 1 Pr. Wms., 595. 1 Dan. Ch. Pr. 414.

⁷ Mitf. Plea., 132.

⁸ Ibid., 130.

⁹ Ibid., 129; 1 Dan. Ch. Pr., 427.

v that two or more distinct subjects cannot be combined in one suit. An offence against this rule is termed multifariousness and will render a bill liable to demurrer;¹⁰ but it should be observed that this rule will only apply where a plaintiff claims several matters of different natures by the same bill;—where one general right only is claimed by the bill, though the defendants have separate and distinct interests, a demurrer will not hold.¹¹

§ 20. A bill should not contain statements or charges which are scandalous or impertinent.¹² Scandal consists in the allegation of anything which is unbecoming the dignity of the court to hear, or is contrary to good manners, or which charges some person with a crime not necessary to be shown in the cause. Any unnecessary allegation bearing cruelly upon the moral character of an individual is scandalous.¹³ Impertinences are described by Lord Chief Baron Gilbert to be
v “where the records of the court are stuffed with long recitals, or with long digressions of matter of fact, which are altogether unnecessary and totally immaterial to the matter in question.”¹⁴

§ 21. It is not a ground of demurrer that scandalous or impertinent matter is introduced in a bill—the parties defendant are only entitled to have the record purified by expunging such matter and a reference to a commissioner for that purpose will be ordered.

¹⁰ 1 Dan. Ch. Pr., 437.

¹¹ Mitf. Plea., 147.

¹² 1 Dan. Ch. Pr., 452.

¹³ Ibid., 452.

¹⁴ Gilb. For. Rom., 209. The writer has seen but one case of scandal or impertinence in pleadings in Virginia. This occurred in an answer to a bill filed in the Court of Chancery at Richmond in a suit entitled “Mason vs. Mason and als.” The answer will be printed in the Appendix to this volume.

§ 22. Beside these requisites, it is further necessary in every bill to pray the court to grant the proper relief suited to the case as made by the bill; and if for any reason founded on the substance of the case as stated in the bill, the plaintiff is not entitled to the relief he prays, either in whole or in part, the parties defendant may demur.¹⁵ It is usual to insert in every bill a prayer for general relief, and it seems that a special prayer is not absolutely necessary when this general prayer is inserted.¹⁶

§ 23. There are other requisites appertaining to bills adapted to particular purposes. These will be seen on reference to the chapters treating of such bills.

FORM OF BILLS.

§ 24. Every bill should have a convenient form. Original bills praying relief being of more frequent use, and the several other kinds of bills so nearly resembling them in form, it is deemed proper here to set forth simply the form of original bills alone.

§ 25. The form of an original bill praying relief usually consists of nine parts:¹⁷ 1st. The address to the court. 2d. The names of the parties plaintiff. 3d. The statement of plaintiff's case, usually denominated the stating part of the bill. 4th. The charge of confederacy on the part of defendants with others to deprive the plaintiff of his right. 5th. The allegation that the

¹⁵ Mitf. Plea., 133; I. Dan. Ch. Pr. 429.

¹⁶ But see *post*, note 41 to sec. 58, p. 23.

¹⁷ This division into nine parts is not universally adopted by legal writers. Lube deems it illogical and incorrect; he makes only four. Adams, in his *Treatise on Equity*, makes the like number. Justice Story adopts the division in the text.

defendants intend to set up a particular sort of defence, the reply to which the plaintiff anticipates, by alleging certain facts which will defeat such defence; this is termed the charging part. 6th. The statement that the plaintiff has no remedy without the assistance of a court of equity, which is called the averment of jurisdiction. 7th. The interrogating part, in which the stating and charging parts are converted into interrogatories for the purpose of eliciting from the defendant a circumstantial discovery upon oath of the truth or falsehood of the matters stated and charged. 8th. The prayer for relief; and, 9th. The prayer that process may issue.

In Virginia State Courts.—Some of these parts are rarely, if ever, used in Virginia. In bills prepared by eminent counsel the charging part is omitted altogether, while the purpose of the interrogating part is served by the general prayer that each of the defendants shall be required to answer the several statements of the bill as fully and particularly as if they were repeated, and the defendants specially interrogated in relation thereto.¹⁸ The averment of jurisdiction is usually inserted. The charge of confederacy is not.

In United States Courts.—The Rules of the Supreme Court of the United States, prescribed for the Circuit Courts of the United States, leave it optional with the party plaintiff to insert in his bill the confederacy clause; but expressly require that the prayer of the bill should ask the special relief to which the plaintiff supposes himself entitled, besides a prayer for general relief;¹⁹ and further provide that the interrogating

¹⁸ See 1 John. Ch. Rep. 65.

¹⁹ XXI. Rule of United States S. C.

clause shall be inserted, the form of which is given in the 43d rule, and will be cited hereafter.

§ 26. With these remarks upon the practice in this country, we proceed to lay before the reader the several purposes which these parts of the bill were intended to serve in England, and their forms as used in that country and in this.

1. *Address of the Bill.*

§ 27. In England, every bill must be addressed to the person or persons who have the actual custody of the Great Seal at the time of its being filed, unless the person holding the seals is a party or the seals are in the King's own hand, in which cases the bill must be addressed: "To the King's most excellent Majesty in his High Court of Chancery."²⁰

§ 28. In the United States Circuit Courts, the address is as follows: "To the Judges of the Circuit Court of the United States for the District of ——" ²¹

§ 29. In the Virginia State Courts, when suit is brought in a Circuit Court, the address is as follows: "To the honorable J. B. C., Judge of the Circuit Court for the county of ——" ; when brought in a County Court, the address is thus: "To the worshipful justices of the County Court of — county:"

2. *Names of Plaintiffs.*

§ 30. In England, it is not only necessary that the names of the several complainants in a bill should be correctly stated, but the description and place of abode of each plaintiff must be set out.²²

²⁰ 1 Dan. Ch. Pr., 462.
Mitf. Pl. 7.

²¹ XX. Rule of United States S. C.
²² 1 Dan. Ch. Pr., 463.

§ 31. In the United States Circuit Courts, it is requisite to state in the bill the names and residence of the several parties plaintiff and defendant.²³ The reason of this rule is apparent: those courts in most cases between citizen and citizen, having jurisdiction only where the matters of controversy exist between citizens of different States, the citizenship should appear on the face of the bill.²⁴

§ 32. In the Virginia State Courts, the names of the plaintiffs are usually inserted, without a description of employment or place of abode.²⁵ It is usual, however, whenever the bill is preferred by a next friend, or committee, or the like, to insert a description of the character in which party plaintiff sues, as will be seen in examples hereafter given.

§ 33. In the English Courts, the manner of introducing the statement with the names of the plaintiffs is as follows: "Humbly complaining, sheweth unto your Lordship, your orator A. B., of the parish of —, in the county of —, *gentleman* (or *yeoman*,) that, &c." In the United States Circuit Courts, as follows: "A. B. of —, and a citizen of the State of —, brings this his bill against C. D. of —, and a citizen of the State of —, and E. F. of —, and a citizen of the State of —; and thereupon your orator complains

²³ XX. Rule of United States S. C.

²⁴ Dodge vs. Perkins, 4 Mason, 435.

²⁵ The propriety of this course has never been raised by a demurrer in Virginia. If attempted now, it would undoubtedly prove a fruitless effort, though in England a demurrer to a bill on the ground that the place of abode was not stated has been sustained. See Rowly vs. Eccles, 1 S. and S. 511.

and says that, &c.”²⁶ In the Virginia State Courts, when presented to a Circuit Court, as follows: “Humbly complaining, sheweth unto your honor, your orator A. B., that,” &c., and when presented to a County Court: “Humbly complaining, sheweth unto your worships, your orator,” &c.²⁷

3. *Stating Part.*

§ 34. This part of the bill contains the statement of the plaintiff's case. The statement should be clear, direct and positive, as to all matters necessary to support the plaintiff's equity; but where a matter essential to the determination of the plaintiff's claim is charged to rest within the knowledge of a defendant, or must of necessity be within his knowledge, and is consequently the subject of a part of the discovery sought by the bill, a precise allegation is not required.²⁸

§ 35. The statement should not be argumentative, nor should it contain long recitals from deeds or other instruments *in hæc verba*,²⁹ and as has been stated heretofore, the statement should not contain irrelevant or impertinent or scandalous matter.

²⁶ XX. Rule United States S. C.

²⁷ It should be noted here, that when a plaintiff sues on behalf of himself, and others of a class with himself, the fact is usually stated in this part of the bill; 1 Dan. Ch. Pr., 464. As in the case of a “Creditor's bill,” which runs thus: “Humbly complaining, sheweth unto your honor your orator A. B., who sues on behalf of himself, and of such other, the creditors of C. D. deceased, who shall come in and seek relief by and contribute to the expense of this suit, that,” &c.

²⁸ 1 Dan. Ch. Pr., 466.

²⁹ There are cases in which the plaintiff's case turns upon the construction of words in written instruments; in such cases, it surely would not be deemed improper to spread on the face of the bill the precise words of the instrument.—See Dan. Ch. Pr., 469.

§ 36. Although in bills in equity the same precision of statement that is required in pleadings at common law is not attainable, yet it is absolutely necessary that such a convenient degree of certainty should be adopted as may serve to give the defendant full information of the case which he is called upon to answer.³⁰

§ 37. Every fact necessary to the plaintiff's case should be set forth in the stating part of the bill; otherwise, he will not be permitted to offer or require any evidence of such fact.³¹ A general charge or statement, however, of the matter of fact is sufficient; though, it seems that a defect here cannot be cured by a subsequent interrogatory.³²

§ 38. In the English Courts, the stating part of the bill is kept distinct and separate from the confederating clause and the charging part. This will be seen on reference to the forms in Appendix. In the United States Circuit Courts, a party plaintiff is at liberty to omit altogether the confederacy clause and the charging part of the bill, and in his narrative, or stating part, to state and avoid by counter averments at his option any matter or thing which he supposes will be insisted upon by the defendant, by way of defence or excuse, to the case made by the plaintiff for relief.³³ In the Virginia State Courts, it is the practice to set forth the statement of the plaintiff's case in the stating part, and to merge in it the charge of confederacy if deemed necessary, and any matter of offence or defence thought expedient by the plaintiff or his counsel.

§ 39. The main point to be looked to is the fact,

³⁰ 1 Dan. Ch. Pr., 476.

³¹ Story's Eq. Pl. p. 26, sec. 28.

³² Ibid. See 4 Munf. 273.

³³ XXI. Rule Supreme Court U. S.

whether in the statement of his case in the bill the plaintiff has set forth every material averment necessary to support his right to the relief he asks.

§ 40. Here follows a form of a statement in an English bill, to foreclose a mortgage: "That C. D., being seized to him and his heirs in fee simple or otherwise well entitled unto, the messuages, lands, tenements, and hereditaments, hereinafter mentioned, applied to and requested your orator to advance and lend him the sum of £——, upon the security or mortgage of the said messuages, lands, hereditaments, and premises; and your orator, having agreed thereto, did accordingly advance and lend the same to the said C. D.; and, thereupon for securing the re-payment of the said £——, and interest for the same, an indenture, (*recite mortgage securities.*) And your orator farther sheweth, &c., that the said £——, or any part thereof, was not paid to your orator, or any other person on his account, at the time limited and appointed in that behalf by the said last-mentioned indenture, or at any other time, but default was made in the payment thereof, whereby the legal estate of the said messuages, lands, hereditaments, and premises, became vested in your orator; and your orator farther sheweth, &c., that the whole of the principal sum of £——, is now due and owing to your orator, together with a large arrear of interest thereon, and your orator being desirous of being repaid the same, has frequently, and in a friendly manner, applied to and requested the said C. D. to come to a fair and just account with him, for what is due and owing to him for principal and interest on his said mortgage security, of the —— day of ——, and to pay to your orator

what shall be found due to him on taking such account; and your orator well hoped, &c."

§ 41. This form of statement may be used in bills filed in the United States Circuit Courts and in the Virginia State Courts; though the statement is not usually so precise in bills filed in those courts.

4. Charge of Confederacy.

§ 42. This part of an English bill is as follows: "But now so it is, may it please your Lordship that the said C. D., combining and confederating with divers other persons at present unknown to your orator, (whose names when discovered your orator prays may be herein inserted with apt and proper matter and words to charge them as parties hereto,) and in order to give some color to such refusal, sometimes pretends that he never had or received any such sum or sums of money of your orator as aforesaid, and that he never made and executed any such indenture as aforesaid, and that he goes out and pretends that there are many other mortgages, charges and encumbrances affecting the said premises made and executed by him, or some person under whom he claims, prior in point of time to that made by him to your orator. (Whereas, &c., *then follows the charging part hereafter cited.*)

§ 43. In England, this confederacy clause, though generally introduced, is not necessary.³⁴ In this country, as we have seen, both in the United States Circuit Courts and in the Virginia State Courts, it is usually omitted.

³⁴ 1 Dan. Ch. Pr., 483.

5. *Charging Part.*

§ 44. This part of an English bill is as follows: "Whereas your orator chargeth the truth to be that the said C. D. did receive of your orator the said sum of money, and that he did execute the indenture aforesaid. And your orator further charges that if there are any mortgages, charges, or encumbrances affecting the said mortgaged premises, or any part thereof, they are subsequent to your orator's said mortgage; and your orator farther charges, that the said mortgaged premises are a scanty security for the repayment of what is due for principal and interest upon the said mortgage; all which actings, doings, and pretences of the said defendant, are contrary to equity and good conscience, and tend to the manifest wrong and injury of your orator in the premises."

§ 45. The practice which now prevails in England of inserting this clause, is said to have originated in order to obviate the necessity of setting forth by a special replication additional facts in avoidance of new matter introduced by the defendant's plea or answer.

§ 46. Though it would appear to be more necessary that this feature of the English bill should be retained, the special replication having gone out of use, it is not usual to insert this clause in bills drawn in this country.³⁵

³⁵ Whenever the plaintiff deems his bill not properly adapted to his case, he obtains leave to file and does file an amended or supplemental bill adapted to the defence.—Kent C. J. in *James v. McKennon*, 6 John. Rep. 564.

6. Averment of Jurisdiction.

§ 47. This part of an English bill runs thus: "In tender consideration whereof, and for as much as your orator is remediless in the premises by the strict rules of common law, and cannot have adequate relief except in a court of equity where matters of this kind are properly cognizable and relievable." The form is the same when used here, in the United States Circuit Courts and in the Virginia State Courts.

§ 48. This clause, it is said, was originally intended for the purpose of giving the court jurisdiction. The making of this averment does not give the court jurisdiction where it had it not otherwise, and, it has been settled, that the omission of this averment will not deprive the plaintiff of relief.

§ 49. The Rules of the Supreme Court of the United States provide that it may be omitted in bills filed in the Circuit Courts of the United States.

§ 50. In bills filed in the Virginia State Courts, it is usually inserted, though of no utility.

7. Interrogating Part.

§ 51. The bill having shown the title of the persons complaining to relief, and that the court has jurisdiction for the purpose, prays that the parties defendant may answer all the matters contained in the former part of the bill, not only according to their positive knowledge of the facts stated, but also according to their remembrance, the information they have received and the belief they are enabled to form on the subject.³⁶

³⁶ Mitf. Plea. 51.

§ 52. Experience having proved that the substance of the matters stated and charged in a bill may frequently be evaded by answering according to the letter only, it has become a practice to add, to the general requisition that the defendants should answer the contents of the bill, a repetition by way of interrogatory, of the matters most essential to be answered; adding to the inquiry after each fact, an inquiry of the several circumstances which may be attendant upon it, and the variations to which it may be subject, with a view to prevent evasion, and compel a full answer.³⁷ This is commonly called the interrogating part of the bill; and as it is used only to compel a full answer to the matters contained in the former part of the bill, it must be founded on those matters.³⁸

§ 53. The 40th Rule of the Supreme Court prescribed that in the United States Circuit Courts a defendant should not be bound to answer any statement or charge in the bill, unless specially and particularly interrogated thereto, or any interrogatory in the bill, except such as he was specially required to answer; but this rule has been repealed.³⁹ By another rule of the same court, the interrogatories contained in the interrogating part of the bill were required to be divided as conveniently as may be from each other, and numbered consecutively 1, 2, 3, &c., and the interrogatories which each defendant was required to answer, to be specified in a note at the foot of the bill, in the following form: "The defendant, A. B., is required to

³⁷ 1 Dan. Ch. Pr., 487, Mitf. Plea. 51.

³⁸ 1 Dan. Ch. Pr., p. 487.

³⁹ See XCIII. Rule printed in Appendix.

answer the interrogatories numbered respectively 1, 2, 3, &c.," and by another rule of the same court, it was provided that instead of the words of the bill as *used in the High Court of Chancery of England*, preceding the interrogatory part, these shall be used: "To the end, therefore, that the said defendants may, if they can, show why your orator should not have the relief hereby prayed, and may, upon their several and respective corporal oaths, and according to the best and utmost of their several and respective knowledge, remembrance, information, and belief, full, true, direct, and perfect answer make to such of the several interrogatories hereinafter numbered and set forth, as by the note here under written, they are respectively required to answer; that is to say—1. Whether, &c. 2. Whether, &c." How far these several rules are affected by the 92nd rule, may be readily determined on reference to that rule.

§ 54. It has been already stated, that in the Virginia State courts the interrogatory clause is inserted, though usually with not such particularity as in English bills.

§ 55. The interrogatory clause in an English bill is now like that contained in section 53. Formerly it was as follows: "To the end, therefore, that the said C. D. and his confederates, when discovered, may, upon their several and respective oaths, according to the best and utmost of their several and respective knowledge, remembrance, information and belief, a full, true, direct and perfect answer make to all and singular the matters aforesaid, and that as fully as if the same were here repeated and they particularly interrogated thereto; and more especially that the said defendant may, in manner aforesaid, answer and set forth, whe-

ther, (here insert interrogatories to probe the conscience of defendants.)”

8. *Prayer for Relief.*

§ 56. Although there is no doubt but that a mere prayer for general relief would in most cases, if not in all, be sufficient to enable the plaintiff to obtain such a decree as his case entitles him to, yet it is the usual and more convenient practice to precede the request for general relief by a prayer for the specific relief which the plaintiff desires.⁴¹

§ 57. This part of an English bill is as follows:

Special Relief.—“And that it may be referred to one of the masters of this honorable court to take an account of what is due to your orator for principal and interest on his said mortgage security from the said defendant, and that the said defendant may be decreed to pay to your orator what shall be found due on such account, by a short day to be appointed by this honorable court in that behalf, together with your orator’s ~~course~~; and, in default, that the said C. D., and all persons claiming under him, may be forever barred and foreclosed of and from all right of redemption of, in, and to the said mortgaged premises, or any part thereof; and may deliver up to your orator all deeds, papers, or writings, in his custody or power, relating to or concerning the said mortgaged premises.”

General Relief.—And that your orator may have all such farther and other and general relief in the prem-

⁴¹ The Rules of Supreme Court United States require plaintiff to pray for special relief. An injunction ought always to be prayed for specially.—Eden on Injs., 49.

ises as the nature of his case may require, or to equity shall seem meet."

§ 58. The prayer for general relief can never be safely omitted, because if the plaintiff should in his special prayer mistake the due relief, it may be given under the general prayer if consistent with that which is actually prayed.⁴²

9. *Prayer for Process.*

§ 59. The following is the prayer for process in an English bill: "May it please your Lordship to grant unto your orator his Majesty's most gracious writ of subpoena to be directed to the said W. B., thereby commanding him, at a certain day and under a certain pain therein inserted, personally to be and appear before your Lordship in this honorable court, then and there to answer the premises."

§ 60. It will be observed that, in this form, the process is prayed to be directed to the party defendant. This is not the practice either in the United States Circuit Courts or in the Virginia State courts. All process, here, is directed to officers of the court. The prayer for process of subpoena in the United States Circuit Courts should contain the names of all the defendants named in the introductory part of the bill; and if any of them are known to be infants under age, or otherwise under guardianship, should state the fact. This is required by the 23d rule of Supreme Court. The prayer for process in United States Circuit Courts is as follows: "May it please the honorable court to grant

⁴² Adams Equity, 565. If a bill contains no prayer either for specific or general relief, it is considered as a bill of discovery only. See *post*.

a writ of subpoena, directed to the Marshal of the District of —, and commanding the said — to appear and make answer unto this bill of complaint and to perform and abide by such orders and decrees herein as to the court may seem required by the principles of equity and good conscience.”

In the Virginia State courts, the prayer for process is not unfrequently omitted altogether, and when inserted is usually drawn in terms such as these: “That proper process may be directed against the several defendants hereinbefore named;” and is oft-times used in the bill before the prayer for general relief, thus: “that proper process may be directed against the several defendants herein-before named, and that your orator may have all such farther and other and general relief as the nature of his case may require, or to equity may seem meet.”

§ 61. Beside these several parts of bills, there are other requisites necessary to be attended to in their preparation; some equally applicable to every bill, others alone proper in bills designed for special purposes.

§ 62. Thus, to every bill the signature of counsel should be affixed⁴³; to a bill of injunction, beside the special prayer for the restraining order of the court or judge, an affidavit of the truth of the statements made

⁴³ This is specially required in bills filed in United States Circuit Courts, by the 24th rule of United States Supreme Court. In the Virginia State Courts the rules of practice which each Equity Court adopts for its own government, generally requires the signature of counsel to bills; but the practice is very loose in those courts, and in many instances the counsel does not affix his signature. In England, the rule is imperative that the signature of counsel must be subscribed to every bill before it is filed, (Mitf. PL 48;) and if it be not, the bill will be dismissed on the defendant's demurrer. 1 Dan. Ch. Pr. 409.

in the bill should be annexed; and an affidavit is also required in bills of discovery, and in other species of bills.

§ 63. The reader will find in the Appendix to this volume, complete forms of bills as exhibited in the English courts, in the United States courts, and in the Virginia State courts, showing the several parts of the bill in juxta-position.

INFORMATIONS.

§ 64. *Of their matter.* Informations in every respect follow the nature of bills, except in their style. When they concern only the rights of the State or of those whose rights the State takes under its particular protection, they are generally exhibited in the name of the Attorney General as the informant.* In the latter case always, and sometimes in the former, a relator is named, who in reality sustains and directs the suit. It may happen that this person has an interest in the matter in dispute, and sustains the character of plaintiff as well as relator; in such event, the pleading is styled an "information and bill." The proceedings upon an information can only abate by the death or determination of interest of the defendant.

§ 65. *Of their form.* The difference in form between an information and a bill consists merely in offering the subject matter as the information of the officer in whose name it is exhibited, at the relation of the person who suggests the suit, in those cases where a relator is named, and in stating the acts of the defendant to be

*In some cases other officers of the State, and of the United States, are necessary plaintiffs.

PROCEEDINGS AT RULES.

injurious to the State or to those whose rights the State thus endeavors to present. When the pleading is at the same time an information and bill, it is a compound of the forms used for each, when separately exhibited.

§ 66. Forms of information separately and of an information and bill combined, may be seen in the Appendix to this volume.

CHAPTER III.

Of the filing of the bill or information and subsequent proceedings at rules, in Virginia State Courts, and of proceedings at rules in United States Circuit Courts.

FILING OF BILL.

§ 67. In the Virginia State Courts, if the plaintiff has not previously filed his bill or information, he may do so at the next rules after the summons has been issued, or at any subsequent rule day.¹ Care should be taken, however, to file it at an early date after the service of process upon one or more of the defendants; otherwise, the suit may be dismissed, on account of the

¹ In injunction bills, ne exeat bills and the like, requiring the action of the judge or court directing restraining process, the bill is uniformly filed before process issues.

failure to file it,² and, in case the defendant has appeared and given a rule, the plaintiff will be required to pay the defendant five dollars beside his costs.³

DECREE NISI, RULE TO PLEAD.

§ 68. If the summons has been executed on any party defendant, such party will be required to appear at the rule day at which the process against him is returned executed, or, when it is returnable to a term, at the first rule day after it is so returned; and on his failure to appear, the plaintiff, if he has filed his bill, may have entered a *decree nisi* as to such defendant;⁴ when defendant has appeared, yet fails to plead, answer or demur to the bill when filed, the plaintiff should give him a rule to plead.⁵

BILL TAKEN FOR CONFESSED.

§ 69. At the next rules after the *decree nisi* has been entered, or a rule to plead given, if the defendant continue in default, the bill will be entered as taken for confessed as to him,⁶ and the plaintiff may at the same rules, or at a succeeding rules, have the cause set for hearing as to such defendant.⁷

PLEA AND DEMURRER.

§ 70. Usually, the defendant either pleads, demurs or answers to the bill at rules.⁸

² See sec. 8 and 9, *ante* p. 5.

³ See sec. 8, *ante* p. 5.

⁴ Code of Virginia, chap. 171, sec. 42. The form of a *decree nisi* may be seen in the Appendix to this volume.

⁵ Code of Virginia, chap. 171, sec. 42.

⁶ *Ibid.*

⁷ *Ibid.*, chap. 171, sec. 48.

⁸ See *post*.

§ 71. If the defendant plead or demur, the plaintiff may have the plea or demurrer set down for argument; and should it be over-ruled, no other plea or demurrer will afterwards be received, but there will be a rule on the defendant to answer the bill.⁹ Or, in case of a plea, the plaintiff may take issue upon it, and the issue will be tried by a jury; if the plea be found false, the plaintiff will have the same advantage as if it had been so found by verdict at law.¹⁰

FILING OF ANSWER, REPLICATION, &C.

§ 72. The Virginia statute provides that a defendant at any time before a final decree, may be allowed to file his answer; but a cause shall not be sent to the rules or continued, because an answer is filed on it, unless good cause be shown therefor;¹¹ yet, after the suit has been set for hearing at the rules as to any defendant, it is the practice of clerks not to enter an answer as filed, unless directed to file it by an order of court; and the propriety of this practice has never been questioned.

§ 73. When the answer is filed, if it be filed at rules, the plaintiff may reply or except, or may have the cause set for hearing on the answer alone, at the rules at which it is filed.¹²

§ 74. If the plaintiff file a general replication, the cause will be set for hearing.

⁹ Code of Virginia, chap. 171, sec. 32,

¹⁰ Ibid, sec. 33,

¹¹ Code of Virginia, chap. 171, sec. 34.

¹² Ibid, sec. 48. Formerly, special replications were in use. Their place is now supplied by an amendment of the bill whenever the plaintiff deems his bill not properly adapted to his case; and general replications are alone used in this country and in England. See *ante*, note 35, p. 19.

§ 75. When the plaintiff files exceptions to the answer, they are set down for argument, and, if the exceptions be sustained, the defendant will be required to answer anew, to which plaintiff may either reply or except as before. Should the defendant put in a second answer which is adjudged insufficient, he may be examined upon interrogatories, and committed until he answers them.¹³

WHEN SUIT SET FOR HEARING BY DEFENDANT, AND
DEFENDANT'S RIGHT TO HAVE CAUSE HEARD AS TO
HIMSELF.

§ 76. If four months elapse after the answer of a defendant is filed, without the cause being set for hearing by the plaintiff, and without exceptions being filed to the answer, the defendant may have the cause set for hearing as to himself,¹⁴ and is, moreover, entitled to have the suit heard as to him, unless his interests be so connected with those of other defendants in the suit that it would be improper to decide upon their interests separately¹⁵; and, even though there be such connection of interests, such defendant may have an order upon the plaintiff to use due diligence to mature the cause for hearing as to the other defendants, and unless it be so matured within such time as the court may deem reasonable, such defendant will be entitled to a hearing or dismissal of the suit as to him.¹⁶

INFANTS OR INSANE DEFENDANTS.

§ 77. Should there be an infant or insane defendant, a guardian *ad litem* may be appointed to defend his

¹³ Code of Virginia, chap. 171, sec. 36.

¹⁴ Code of Virginia, chap. 171, sec. 48.

¹⁵ *Ibid*, sec. 50.

¹⁶ Code of Virginia, chap. 171, sec. 50.

interest, by the clerk at rules, whether the infant or insane defendant has been served with process or not; and the court may compel the person so appointed to act, but he shall not be liable for costs, and shall be allowed his reasonable charges, which the party on whose motion he was appointed shall pay.¹⁷

ABSENT OR UNKNOWN DEFENDANTS.

§ 78. It not unfrequently happens that one or more of the parties defendant reside beyond the borders of the State, or are unknown to the party plaintiff. In such cases, if the ordinary process of summons was alone resorted to, the plaintiff would never be able to secure a hearing of his cause. To meet these contingencies, the Virginia Statute has provided that on affidavit that a defendant is not a resident of this State, or that diligence has been used by or on behalf of the plaintiff to ascertain in what county or corporation he is, without effect, or that process, directed to the officer of the county or corporation in which he resides, or is, has been twice delivered to such officer more than ten days before the return day, and been returned without being executed, an order of publication may be entered against such defendant; and further provides, that in any suit in equity where the bill states that the names of any persons interested in the subject to be divided or disposed of, are unknown, and makes such persons defendants, by the general description of parties un-

¹⁷ Code of Virginia, chap. 171, sec. 16. The *guardian ad litem*, in Virginia, usually files a formal answer, submitting the interests of the infant or insane defendant to the protection of the Court. He may, however, if he deems it necessary, take the same mode of defence with other defendants, by plea or demurrer, or by an answer either contradicting or affirming the statements of bill.

on affidavit to that effect,
known, an order of publication may be entered against such unknown parties.¹⁸

§ 79. This order of publication must state briefly the object of the suit, and require the defendants against whom it is entered, or the unknown parties, to appear within one month after the due publication thereof, and do what is necessary to protect their interests.¹⁹

for one week
§ 80. The order should be published once a week, in such newspaper as the court may prescribe, or, if none be so prescribed, as the clerk may direct, and should be posted at the front door of the court-house of the county or corporation wherein the court is held, on the first day of the next county or corporation court after it is entered.²⁰

§ 81. When these requirements of the Virginia statute are complied with, if the defendants against whom the order of publication has been entered, or the unknown parties, do not appear within one month after the publication is completed, the case may be tried or heard as to them, and the court may enter such decree or order upon such trial or hearing, as may appear just.²¹

¹⁸ Code of Virginia, chap. 17§ sec. 10.

¹⁹ Ibid, sec. 11.

²⁰ Code of Virginia, chap. 17§ sec. 11.

²¹ Ibid, sec. 12. When a trial is had under such circumstances, the Statute provides that the unknown party or other defendant, who was not served with process and did not appear in the case before the date of the decree or order, or the representative of any such, may, within five years from that date, if he be not served with a copy of such decree or order, more than a year before the end of the said five years, and if he be so served, then, within one year from the time of such service, petition to have the cause re-heard, and may plead or answer, and have any injustice in the proceedings corrected. Code of Virginia, chap. 170, sec. 13.

PROCESS OF CONTEMPT.

§ 82. It sometimes happens that a defendant neither demurs, pleads nor answers. When this is the case, as we have already seen, the plaintiff may have his bill taken for confessed, and the cause set for hearing. There are instances, however, in which the plaintiff deems it proper to compel an answer from the defendant; and, in such cases, he may, in the Virginia State Courts, either obtain an order to bring in the defendant to answer interrogatories, or he may resort to what is termed in the law books the "process of contempt."

§ 83. The process of contempt in England was originally intended to compel an answer, and in default of an answer, the Court might take the bill *pro confesso*, and would proceed to decree against the defendant, on the assumption of its truth. As has been seen, in the Virginia State Courts the bill may be taken for confessed without resorting to this process; and it is resorted to here, as stated in the last section, for the purpose of compelling an answer, whether the bill has or has not been taken for confessed.

§ 84. In England, the processes of contempt were originally five; and, though by subsequent legislation in that country, these steps have been considerably shortened, yet here they remain the same. Adams, in his late treatise on Equity, sums up these processes as follows:

"1st. A writ of attachment directed to the sheriff of the defendant's county, commanding that the defend-

ant's person should be attached.²² To this writ the sheriff might return, 1. That he had the defendant in custody; 2. That he had taken him but had accepted bail; 3. That he could not find him within his bailiwick. On the first of these returns being made, the defendant was brought up by habeas corpus, on the second by the messenger of the Court, or the serjeant-at-arms, and in either case was committed to the Fleet, now altered to the Queen's Prison. On the third return, that of *non est inventus*, the next process of contempt issued.

"2d. A writ of attachment with proclamations; on which the same returns might be made, and the same results would follow.²³

²² The form of this writ is as follows :

"George the Third, by the grace of God, of Great Britain, France and Ireland King, Defender of the Faith, and so forth, to the sheriff of Wiltshire, greeting :

"We command you to attach Edward Willis, so as to have him before us, in our court of chancery, wheresover the said court shall then be, there to answer to us, as well touching a contempt which he, as is alledged, hath committed against us, as also such other matters as shall then be laid to his charge; and further to abide such order as our said court shall make in this behalf; and hereof fail not, and bring this writ with you.

"Witness ourselves at Westminster, the ——— day of ———, in the 33d year of our reign.

ARDEX.

WINTER."

Indorsed, "By the court, at the suit of James Willis, for want of appearance," (or answer.)

Label. To the sheriff of Wiltshire.

"An attachment against Edward Willis for not appearing at the suit of James Willis, returnable in ———," &c.

²³ The form of this writ is as follows :

"George the Third, by the grace of God, of Great Britain, France and Ireland, King, Defender of the Faith, and so forth, to the sheriff of Middlesex, greeting :

"We command you, on our behalf, to cause public proclamation to be made in all places within your bailiwick, as well within liberties as

"3d. A writ of rebellion directed to commissioners appointed by the Court, and extending into all the counties of England. On this process no bail could be taken; but the commissioners either brought the defendant up in custody, on which he was committed to the Fleet; or made a return of *non est inventus*, upon which followed,"²⁴

"4th. An order that the serjeant-at-arms, as the immediate officer of the Court, should effect the arrest. If an arrest were made under this process, it was fol-

without, wheresoever you shall think it most convenient, that Edward Willis do, upon his allegiance, on the — day of — personally appear before us, in our court of chancery, wheresoever it shall then be; and, nevertheless, in the mean time, if you can find the said Edward Willis, attach him, so as to have him before us, in our said court, at the time before mentioned, there to answer to us, as well touching a contempt, &c. (As in the single attachment.)"

²⁴ The form of this writ is as follows :

"George the Third, by the grace of God, of Great Britain, France and Ireland, King, Defender of the Faith, &c., To Bamber Tyler, William Fowler, John Miller, and Thomas Porter, greeting :

"Whereas, by public proclamations made on our behalf, by the sheriff of Middlesex, in divers places of that county, by virtue of our writ to him directed, Edward Willis hath been commanded upon his allegiance, personally to appear before us in our court of chancery, at a certain day, now past; yet he hath manifestly contemned our said command; therefore, we command you jointly and severally, to attach, or cause the said Edward Willis to be attached, wheresoever he shall be found, within our kingdom of Great Britain, as a rebel and contemner of our laws, so as to have him or cause him to be before us in our said court, on, &c., wheresoever it shall then be, to answer to us, as well touching the said contempt as also such matters as shall be then and there objected against him, and further to perform and abide such order as our said court shall make in this behalf. And hereof fail not. We also hereby strictly command all and singular, mayors, sheriffs, bailiffs, constables, and other our officers and loyal servants and subjects, whomsoever, as well within liberties as without, that they, by all proper means, diligently aid and assist you, and every one of you, in all things in the execution of the premises. In testimony whereof we have caused these our letters to be made patent. Witness ourself at Westminster, the — day of —, in the thirty-fourth year of our reign."

lowed, like other arrests, by committal to the Fleet. But if the return were *non est inventus*, there was no further process against the person.²⁵

"5th. A writ of sequestration, issuable only on the return *non est inventus* of the serjeant-at-arms, or on a defendant in custody being committed to the Fleet. This writ was issued, not against the person, but against the property of the defendant, and authorized the sequestrators to take his goods and personal estate, and to enter on his real estate, and to sequester the rents and profits.²⁶ If the sequestration proved ineffectual, there was no further process."

²⁵ This order is as follows :

"JAMES WILLIS, Complainant.

vs.

EDWARD WILLIS and Wm. WILLIS, Defendants.

"Whereas the said defendant hath sit out all process of contempt to a commission of rebellion, for want of his answer to the plaintiff's bill, as by the same under the seal of this Court, and the commissioners' certificate thereupon indorsed, whereby the said commissioners do certify that the said defendant doth abscond himself so that he cannot be taken thereupon, now produced, appears; it is therefore ordered, upon the motion of Mr. . . . , being of the plaintiff's counsel, that the serjeant-at-arms, attending this Court, do apprehend the said defendant, and bring him to the bar of this Court to answer the said contempt."

²⁶ The form of this writ is as follows :

"George the Third, &c. &c. To Samuel Leghorne, Peter Wilkins, Isaac Jones, &c. Whereas James Willis, complainant, exhibited his bill of complaint in our court of chancery, against Edward Willis and William Willis, defendants, and whereas the said Edward Willis, being duly served with a writ issuing out of our said court, commanding him under the penalty therein mentioned, to appear to and answer the said bill, has refused so to do, and thereupon, all process of contempt has issued against him, unto a serjeant-at-arms: And, whereas, the said Edward Willis has of late absconded; and so concealed himself, that the serjeant-at-arms has not been able to find him, as by the certificate of the said serjeant appears: Know ye, therefore, that we, in confidence of your prudence and fidelity, have given, and by these presents do give to you, any three or two of you, full power and authority to enter upon all the messuages, lands, tenements, and real estate whatsoever, of the said

§ 85. The question will naturally suggest itself to the reader, how the third and fourth steps of this process may be taken in the Virginia State Courts. This question will be left for discussion in the Appendix to this volume. The reader will there find, also, the forms of these various processes as now used in the Virginia State Courts, and the United States Courts.

§ 86. In the case of a corporation which cannot be attached, the first step in the process of contempt is by *distringas*,²⁷ and the second by sequestration. There is this further difference between the process of con-

Edward Willis, and to take, collect, receive and sequester into your hands, not only all the rents and profits of the said messuages, lands, tenements and real estate, but also all his goods, chattels and personal estate whatsoever; and, therefore, we command you, any three or two of you, that you do at certain proper and convenient days, and hours, go to and enter upon all the messuages, lands, tenements and real estate of the said Edward Willis; and that you do collect, take and get into your hands, not only all the rents and profits of all his real estate, but also, all his goods, chattels and personal estate, and keep the same under sequestration, in your hands, until the said Edward Willis shall fully answer the complainant's bill, and clear his contempts, and our said court make other order to the contrary.

"Witness, ourself, at Westminster, the ——— day of ———, in the
33d year of our reign.

ARDEN.

WINTER."

²⁷ The form of this writ [in England] is as follows:

"George the Third, &c., to the sheriff of the city of London, greeting—

"We command you to make a distress on the lands and tenements, goods and chattels, of the mayor, commonalty and citizens of our said city of London, within your bailiwick; so as neither the said mayor, commonalty and citizens, nor any other person or persons for them, may lay his or their hands thereon, until our court of chancery shall make other order to the contrary; and, in the mean time, you are to answer to us for the said goods and chattels, and the rents and profits of the said lands, so that the said mayor, commonalty and citizens, may be compelled to appear before us, in our said court of chancery, wheresoever it shall then be, there to answer to us, as well touching a contempt, &c. (as in the attachment.) Witness, &c.

ARDEN.

WINTER."

tempt, as against a corporation and private persons: a sequestration may be stayed, in the case of the latter, on their entering their appearance; in the case of the former, it cannot.²⁸

ORDER TO BRING IN DEFENDANT TO ANSWER
INTERROGATORIES.

§ 87. As was stated in the eighty-second section, there is another method provided for compelling answers from a defendant, in the Virginia State Courts. The party plaintiff may obtain an order for the defendant to be brought in to answer interrogatories; and this may be done, though the bill has already been taken for confessed as to such defendant.²⁹ This course is attended with less embarrassing questions than the regular process of contempt, and, on that account, is preferable in all cases where there is no paramount reason for resorting to that process.

DEATH, MARRIAGE, OR LUNACY OF PARTIES, &C.

§ 88. In the English Courts, when a party dies, or a female party marries, a bill of revivor is necessary to bring the personal representative, heirs and devisees of the deceased party in the one case, and the husband in the other, before the Court. This, also, is the practice in the United States Courts, as will be seen on reference to the 56th and 57th rules of the United States Supreme Court, printed in the Appendix to this volume. This course is not necessary in the Virginia State Courts. In either of the cases mentioned, if the party dying, or female party marrying, be a plaintiff, the

²⁸ Barton's Suit in Equity, by Holcombe, 92.

²⁹ Code of Virginia, chap. 171, sec. 46.

personal representative, heirs and devisees of deceased party, or husband and wife, may move the Court that the suit proceed in his or their name; and if no sufficient cause be shewn against it an order will be entered that the suit proceed according to such motion³⁰; if, however, the party dying, or female party marrying, be a defendant, then a writ of *scire facias*, the form of which will be given in the Appendix, is necessary, and after service of this writ upon the personal representative [heirs or devisees, if necessary parties to suit,] of deceased party, in the one case, and the husband and wife in the other case, if no sufficient cause be shewn against it, an order will be entered that the suit proceed according to such *scire facias* against the personal representative [heirs or devisees] of the deceased party, or the husband and wife.³¹

§ 89. And so, too, when a party becomes convict of felony, or insane, or the powers of a party who is a personal representative or committee cease, if such party be a plaintiff, the cause may be proceeded in on simple motion, as mentioned in the eighty-eighth section; if he be a defendant, then a *scire facias* may be issued and the like proceedings had as on a *scire facias* issued in the cases mentioned in that section.³²

§ 90. The writ of *scire facias* may be issued at any time and made returnable to a day in Court or to a rule day, and, when returnable to a rule day, the clerk will make the necessary order of revival in his rule book, if no sufficient cause be shewn against it³³; and it is de-

³⁰ Code of Virginia, chap. 173, sec. 3.

³¹ *Ibid.*

³² *Ibid.*

³³ The extent of the powers of the clerk in this regard seem not to be very well defined. It is presumed, in the absence of precedent or express

clared by statute that an order may be entered at rules for a case to proceed in the name of the proper party, although the case be on the Court docket.³⁴

§ 91. When, however, in any case, the party whose powers cease is a defendant, the party plaintiff will not be allowed to proceed, upon his previous bill, against such defendant and his successor, unless an order that the suit proceed against the former party be entered at the first term after service of a *scire facias* for or against such successor.³⁵

UNITED STATES CIRCUIT COURTS.

§ 92. The practice in causes at rules in these courts differs materially from the practice of the Virginia State Courts. Uniformly, in those courts, the bill is filed before any step is taken in the cause. The process issued upon the filing of the bill is a *subpœna*, differing somewhat in form from the summons issued in the Virginia State Courts. The mode of holding the rules and the time of holding them are also different, while, in nearly every step, there are greater or less discrepancies between the two modes of practice. The reader is referred to the chapter of this work treating particularly of United States Circuit Courts, and to the Appendix, in which he will find the rules of the United States Supreme Court regulating the practice in the United States Circuit Courts.

legislation upon the subject, that in case the clerk were not fully satisfied he would refer the decision of the question of sufficient cause to the Court; and if the clerk undertook to decide, and did decide improperly, this impropriety might be corrected by the Court at its next term. See Code of Virginia, chap. 171, sec. 51.

³⁴ Code of Virginia, chap. 173, sec. 4. ³⁵ Ibid. sec. 5.

CHAPTER IV.

Of the defence to suits in equity : of demurrers, pleas, answers and disclaimers.

COURSE OF DEFENDANT.

§ 93. Thus far, in this treatise, the attention of the reader has been principally directed to the case on the part of the plaintiff, the method of submitting it to the Court, and the means provided by the practice of Equity Courts for compelling the defendant to appear and answer the bill, or in case of his failure to appear and answer, for giving the plaintiff the relief to which the justice of his case appears to entitle him on the facts as set forth in his bill. It is now proposed to consider in what manner suits in equity may be defended.

§ 94. As we have seen in the preceding chapter, appearances are either voluntary or compulsory: voluntary, when the defendant comes in of his own accord, before the writ has been served upon him, or after such service, and before process of contempt has been sued out against him; compulsory, when he is compelled to appear by the process of contempt.

§ 94 a. By the rules of the Supreme Court of the United States prescribing the mode of practice in the United States Circuit Courts, and by the statutes of Virginia governing the practice in the Virginia State Courts, a party appearing voluntarily has privileges which he would not enjoy if his appearance were compelled by

the process of attachment. The 18th rule of the Supreme Court of the United States provides, that "a plaintiff, if he requires any discovery or answer to enable him to obtain a proper decree, shall be entitled to process of attachment against the defendant to compel an answer; *and the defendant shall not, when arrested upon such process, be discharged therefrom, unless by filing his answer, or otherwise complying with such order as the Court or a judge thereof may direct, as to pleading to or fully answering the bill within a period to be fixed by the Court or judge, or undertaking to speed the cause.*" The Virginia statute enacts that no plea or demurrer shall be received of a defendant who has been brought in by an attachment against him, unless by order of Court upon motion.¹

§ 95. When, therefore, the appearance is not voluntary, defendant is compelled to file an answer, unless he obtain special leave from the Court to take another mode of defence.

§ 96. When, however, the appearance is voluntary, the defendant may adopt either of these several defences :

1. By demurrer, which, admitting the matters of fact alleged by the bill to be true, shews that as they are therein set forth they are insufficient for the plaintiff to proceed upon or to oblige the defendant to answer.²
 2. By plea, when the cause, or some part of it, may by denial or avoidance be stayed, or discharged by matter foreign to the record, by which it will be reduced to a single point.³
 3. By answer, which, controverting the case made by the plaintiff, confesses and avoids or tra-

¹ Code of Virginia, chap. 172, sec. 46.

² Mitf. PL. 106, 108.

³ Mitf. PL. 219; II. Dan. Ch. Pr. 97.

verses and denies the several parts of the bill, or, admitting the case made by the bill, submits to the judgment of the Court upon it, or upon a new case made by the answer, or both⁴; or, 4, by disclaimer, which at once terminates the suit, the defendant disclaiming all right in the matter sought by the bill. All these several modes of defence, or any of them, may be used together, if applied to separate and distinct parts of the bill.⁵

I. DEMURRER.

General nature of demurrers.

§ 97. Whenever any ground of defence is apparent upon the bill itself, either from the matter contained in it, or from defect in its frame or in the case made by it, the proper mode of defence is by demurrer.⁶

§ 98. A demurrer is in substance an allegation by a defendant, which, admitting the matters of fact stated in the bill to be true, shews that as they are therein set forth, they are insufficient for the plaintiff to proceed upon or to oblige the defendant to answer⁷; or that, for some reason apparent on the face of the bill, or because of the omission of some matter which ought to be contained in it, or for want of some circumstance which ought to be attendant thereon, the defendant ought not to be compelled to answer. It therefore demands judgment of the Court whether the defendant shall be compelled to answer the complainant's bill, or that particular part of it to which the demurrer applies.⁸

⁴ Mitf. Pl. 106.

⁵ Ibid. 14.

⁶ II. Dan. Ch. Pr. 19; Mitf. Pl. 107.

⁷ Prac. Reg. 162.

⁸ II. Dan. Ch. Pr. 19; Mit. Pl. 108.

§ 99. A demurrer admits as true the matters of fact stated in the bill, or in that part thereof to which defendant demurs; and so strictly is this rule observed in the English Courts, that where a bill misstated a deed by alleging it to contain a proviso which it did not, Lord Cottenham, upon the argument of a demurrer to the bill, refused to allow the defendant's counsel to refer to the deed itself for the purpose of shewing the incorrectness of the manner in which it was set out, although the bill contained a reference, for "greater certainty as to its contents, &c.," to the deed, as being in the custody of the defendants.⁹ But while a demurrer confesses the matters stated in the bill to be true, such confession is confined to those matters *which are well pleaded*, i. e., matters of fact.¹⁰ It does not, therefore, admit any matters of law which are suggested in the bill or inferred from the facts stated; for, strictly speaking, arguments or inferences or matters of law ought not to be stated in pleading.¹¹ Nor will the Court have any regard to facts averred in a bill which has been demurred to, when they are contrary to any fact of which the Court takes *judicial notice*.¹²

DIFFERENT GROUNDS OF DEMURRER.

§ 100. A demurrer may be either to the relief prayed, or it may be to the discovery only, or to both. If the demurrer be good to [the whole] relief it will be so to

⁹ Campbell vs. Mackay, M. & Craig. 503, 618, cited by Daniell in his Practice, II. vol. 20.

¹⁰ 1 Ves. jr. 72, 78.

¹¹ II. Dan. Ch. Pr. 21.

¹² Ibid. 23.

the discovery.¹³ When the demurrer is to part only of the relief prayed, it will not protect the defendant from a discovery, unless the discovery from which the protection is sought is specially pointed out.¹⁴

Demurrers to original bills for relief.

§ 101. The principal grounds of objection to the relief sought by an original bill, which can appear on the bill itself, and may therefore be taken advantage of by demurrer, are these: 1, that the subject of the suit is not within the jurisdiction of a Court of Equity,¹⁵ [or not within the jurisdiction of Court of Equity in which suit is instituted;] 2, that the plaintiff is not entitled to sue by reason of some personal disability¹⁶; 3, that the plaintiff has no interest in the subject or no title to institute a suit concerning it; 4, that the plaintiff has no right to call on the defendant [though he may have a right to call on others,] concerning the subject of the suit¹⁷; 5, that the defendant has not that interest in the subject which can make him liable to the claims of the plaintiff; 6, that for some reason founded on the substance of the case, the plaintiff is not entitled to the relief he prays.¹⁸ To these may be added, 7, the deficiency of the bill to answer the purpose of complete

¹³ II. Dan. Ch. Pr. 24. See Mitf. Pl. 110, 183.

¹⁴ II. Dan. Ch. Pr. 24. See note (1), p. 218, of Sixth American edition of Mitford's Pleadings, by Moulton.

¹⁵ See Introduction to this work.

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸ As, for instance, that the plaintiff's remedy is barred by lapse of time, or that it appears by the bill that there is another suit depending for the same matter. II. Dan. Ch. Pr. 85.

justice, as, for instance, the want of proper parties¹⁹, and, 8, the impropriety of confounding distinct subjects in the same bill, or of unnecessarily multiplying suits.²⁰

Demurrer to original bills for discovery.

§ 102. The principal objections to a bill which are causes of demurrer to discovery are these: 1, that the case made by the bill is not such in which a Court of Equity assumes a jurisdiction to compel discovery; 2, that the plaintiff has no interest in the subject, or not such an interest as will entitle him to call on defendant for the purpose of discovery; 3, that the defendant has no interest in the subject to entitle the plaintiff to institute a suit against him even for the purpose of discovery; 4, although both plaintiff and defendant may have an interest in the subject, yet that there is not that privity of title between them which gives the plaintiff a right to the discovery required by his bill; 5, that the discovery, if obtained, will not be material; and, 6, that the situation of the defendant renders it improper for a Court of Equity to compel a discovery.²¹

FORM OF DEMURRERS.

§ 103. *General or special.* Demurrers, in their forms, are either general or special. They are general, when no particular cause is assigned, except the usual formulary (to comply with the rules of the

¹⁹ A demurrer for the want of proper parties should designate them, that the plaintiff may be enabled to amend his bill. *Barton's Suit in Equity*, by Holcombe, 98.

²⁰ See *Mitt. Pl.* 110, from which work this 101st section is taken, with slight modifications adapted to the practice in this country.

²¹ *Mitt. Pl.* 185.

Court) that there is no equity. They are special, when the particular defects or objections are pointed out. The former will be sufficient (although special causes are usually stated,) when the bill is defective in substance. The latter is indispensable where the objection is to the defects of the bill in point of form.²² By the rules of Courts of Equity in England, which would in this particular rule the practice in United States Circuit Courts, every demurrer is required to contain the causes thereof,²³ and they must be set down with reasonable certainty and directness.²⁴ Some of the Virginia State Courts have adopted the like rule.

§ 104. The following is the form of a general demurrer for want of equity :

IN CHANCERY.—The demurrer of D. D., J. D., and S. K., three of the defendants to the bill of complaint of S. S. complainant.

These defendants by protestation, not confessing or acknowledging all or any of the matters and things in the said complainant's bill contained to be true in such manner and form as the same are therein and thereby set forth and alleged, do demur to the said bill, and for cause of demurrer shew that the said complainant has not by his said bill made such a case as entitles him in a Court of Equity to any discovery from these defendants respectively or any of them, or to any relief against them, as to the matters contained in the said bill or any of such matters, and that any discovery

²² Story Eq. Pl., sec. 455.

²³ Beames' Ord. in Chan. 77, 78.

²⁴ Barton's Suit in Equity, by Holcombe, 96.

which can be made by these defendants or any of them touching the matters complained of in the said bill or any of them, cannot be of any avail to the said complainant for any of the purposes for which a discovery is sought against these defendants by the said bill, nor entitle the said complainant to any relief in this Court touching any of the matters therein complained of: Wherefore and for divers other good causes of demurrer appearing in the said bill, these defendants do demur thereto, and they pray the judgment of this honorable Court whether they or either of them shall be compelled to make any further or other answer to the said bill, and they humbly pray to be hence dismissed with their reasonable costs in this behalf sustained.

§ 105. The following is the form of a special demurrer to so much of a bill as sought a discovery of title deeds for want of proper affidavit:

The demurrer of, &c. (*as in form in sec. 104.*)

This defendant by protestation, not confessing or acknowledging, &c. (*as in form in §.104, to word "alleged," inclusive,*) as to so much of the said bill as seeks a discovery of the marriage settlement of — the late father and mother of the said complainant, and of the title-deeds and writings relating to the messuages, lands and tenements in the said bill mentioned, and that the same may be delivered up to the said complainant, this defendant doth demur in law, and for cause of demurrer sheweth, that no person or persons by the ancient and approved rule of this honorable Court, shall exhibit a bill of complaint in this honorable Court against any other person or persons for a discovery of deeds and writings belonging to such complainant, and upon

which, if in his possession, he might have remedy at law and pray relief relating thereto, unless such complainant or complainants shall at the time of exhibiting such bill make affidavit that he, she or they have not such deeds and writings so sought after in his, her or their custody or power: Wherefore and for that he said complainant hath not made affidavit of not having the deeds or writings in his custody or power so sought after by the said bill, this defendant doth demur to such part of the bill as aforesaid, and humbly prays the judgment of this Court whether he shall be compelled to make any further or other answer to such part of the said bill as is so demurred unto.

§ 106. *Speaking demurrers*.—Care must always be taken, in framing a demurrer, that it is made to rely upon the facts stated in the bill; otherwise it will be what is termed a *speaking demurrer*, and will be overruled.²⁵ In order to constitute a speaking demurrer, however, the fact or averment introduced must be one which is necessary to support the demurrer and is not found in the bill. The introduction of *immaterial facts* or averments, or of arguments, is improper, but it is mere surplusage, and will not vitiate the demurrer.²⁶

Special rules of Equity Courts.

§ 107. The rules of the United States Supreme Court prescribe other requisites in the form of demurrers presented to the United States Circuit Courts; among others, the signature of counsel.* The Equity Courts

²⁵ 11 Dan. Ch. Pr. 72.

²⁶ Ibid. 72.

* See Rules of Supreme Court in Appendix to this volume.]

in Virginia have generally adopted rules for their own regimen, which govern the practice in these particulars in the several Courts.

When demurrers sustained, when overruled.

§ 108. It would be a departure from the design of this treatise to enter upon this subject in the body of the work. The reader will find, however, in the Appendix, a summary of cases of general application, in which demurrers for relief or for discovery, or for both, have and have not been sustained.

Demurrers to bills not original.

§ 109. Demurrers have hitherto been noticed with reference only to original bills. As every other kind of bill is a consequence of an original bill, many of the causes of demurrer which will apply to an original bill will also apply to every other kind; but the peculiar form and object of each kind afford distinct causes of demurrer to each.²⁷ These will be detailed in the chapters treating of such bills and in the Appendix to this volume.

Procedure on demurrers.

§ 110. The course of procedure on a demurrer depends upon the plaintiff's opinion of its validity. If he thinks that as the bill stands the objection is good, but that he can remove it by restating his case, he may submit to the demurrer and amend his bill. If he thinks the demurrer bad, he may set it down for argument.²⁸ If the demurrer is allowed on argument, the suit is at an

²⁷ Mitf. Pl. 201.

²⁸ See ante, sec. 71, p. 29.

end unless the demurrer is confined to a part of the bill, or the Court give permission to the plaintiff to amend.²⁹ If it is overruled, in the English Courts, the defendant must make a fresh defence by answer, unless he obtain permission to avail himself of a plea;³⁰ in such event, in the United States Circuit Courts and in the Virginia State Courts, it appears there is no alternative: he must answer.³¹ This subject will be further treated of in a subsequent chapter.

II. PLEAS.

General nature of pleas.

§ 111. A demurrer has been mentioned to be the proper mode of defence to a bill when any objection is apparent upon the bill itself, either from matter contained in it or from defect in its frame or in the case made by it. When an objection to the bill is not apparent on the bill itself, if the defendant means to take advantage of it, he must shew to the Court the matter which creates the objection, either by answer or by plea, which latter has been described as "a special answer, shewing or relying upon one or more things as a cause why the suit should be either dismissed, delayed or barred."³²

§ 112. The proper defence for a plea is such as reduces the cause or some part of it to a single point, and from thence creates a bar to the suit, or to the

²⁹ See *post*, chap. V., and Appendix.

³⁰ Adams's Equity, 335, 336.

³¹ Code of Virginia, chap. 171, sec. 32; XXXIV Rule Supreme Court U. S.

³² II Dan. Ch. Pr. 97; Mitf. Pl. 218, 219.

part of it to which the ^{plea} ~~bill~~ applies.³³ It is not, however, necessary that it should consist of a single fact; for though a defence offered by way of plea consists of a great variety of circumstances, yet, if ^{the plea} ~~they~~ all tend to one point, they will be good.³⁴

§ 113. *Affirmative and negative pleas.*—In general, a plea relies upon matters not apparent upon the bill; and in most cases, [though not in all, as will be seen hereafter,] it is a rule, that where a defendant insists upon matter by plea which is apparent upon the face of the bill and might be taken advantage of by demurrer, the plea will not hold.³⁵ Pleas which state matter not apparent upon the bill are termed *affirmative pleas*; they usually proceed upon the ground that, admitting the case stated by the bill to be true, the matter suggested by the plea affords a sufficient reason why the plaintiff should not have the relief he prays or the discovery he seeks; and, when put in, the Court, in order to save expense to the parties or to protect the defendant from a discovery which he ought not to make, instantly decides upon the validity of the defence, taking the plea and the bill, so far as it is not contradicted by the plea, to be true.³⁶ There are pleas, however, which, instead of introducing new facts, merely rely upon a denial of the truth of some matter stated in the bill upon which the plaintiff's right depends. Pleas of this sort are termed *negative pleas*.³⁷ It was at one time a matter of question how

³³ Mitf. Pl. 219.

³⁴ II. Dan. Ch. Pr. 97.

³⁵ Ibid. 97.

³⁶ II. Dan. Ch. Pr. 98.

³⁷ II. Dan. Ch. Pr. 98.

far a negative plea could be good; in one case Lord Thurlow overruled the plea on the ground that it was a negative plea;³⁸ but this decision was afterwards doubted by the Judge himself,³⁹ and since that time frequent instances have occurred in which negative pleas have been allowed.⁴⁰

§ 114. There is another species of plea which often occurs in the books, and is not, strictly speaking, either a plea affirming new matter or negating the plaintiff's title as alleged in the bill, but one which reasserts some fact stated in the bill, and which the bill seeks to impeach, and denies all the circumstances which the plaintiff relies upon as the ground upon which he seeks to impeach the fact so set up. Thus, where a bill is brought to impeach a decree, on the ground of fraud used in obtaining it, the decree may be pleaded in bar of the suit, with averments negating the charges of fraud.⁴¹

§ 115. Whatever the nature of the plea, whether affirmative or negative or of the anomalous character above alluded to, the matter pleaded must reduce the issue between the plaintiff and defendant to a single point. If a plea is double, i. e., tenders more than one defence as the result of the facts stated, it will be bad;⁴² but although this is the general rule, there are cases in which it will be relaxed, where great inconvenience would result to the defendant from denying him

³⁸ *Newman v. Wallis*, 2 Bro. C. C. 142.

³⁹ *Hall v. Noyes*, 3 Bro. C. C. 488.

⁴⁰ II. Dan. Ch. Pr. 98, 99; Mitf. Pl. 230, 231.

⁴¹ II. Dan. Ch. Pr. 99.

⁴² II. Dan. Ch. Pr. 102. 2 Ves. Jr. 84.

this privilege,⁴³ but whenever a defendant desires to put in a double plea, he must obtain an order for leave to do so.⁴⁴ The rule, however, that a defendant cannot plead several matters, must not be understood as precluding a defendant from putting in several pleas to different parts of the same bill; it merely prohibits his pleading a double defence to the whole bill or to the same portion of it.⁴⁵

§ 116. *When plea to be supported by answer.*—Sometimes it is necessary that a plea should be supported by an answer. The occasion of this rule will go very far to explain when such support is necessary and to what extent it is required. It originated thus:—

It is a well established rule that wherever a bill or part of a bill, the substantive case made by which may be met by a plea, brings forward facts which, if true, would destroy the effect of the plea, these facts must be negatived by proper averments in the plea, otherwise they will be considered as admitted, and the defendant will be thus deprived of his defence.⁴⁶ A plea, however, cannot be excepted to; and as it is not necessary that an averment in a plea should do more than generally deny the fact in the bill, the plaintiff might, if no answer were to be required from the defendant in addition to his plea, be deprived of the indefeasible right which he has to examine the defendant upon oath as to all the matters of fact stated in the bill which are necessary to support his case. To obviate this result, the

⁴³ II. Dan. Ch. Pr. 104. See also *Verchild v. Paul*, 1 Keen's Ch. Rep. 87, 90.

⁴⁴ II. Dan. Ch. Pr. 105.

⁴⁵ Ibid.

⁴⁶ II. Dan. Ch. Pr. 112.

rule has been adopted that if there is any statement or charge in the bill which affords an equitable circumstance in favor of the plaintiff's case against the matter pleaded (such as fraud or notice of title,) that statement or charge must be denied by way of answer as well as by averment in the plea.⁴⁷

§ 116 *a*. The thirty-second rule of United States Supreme Court specifically requires that in every case in the United States Circuit Courts in which the bill specially charges fraud or combination, a plea to such part must be accompanied with an answer fortifying the plea, and explicitly denying the fraud and combination and the facts on which the charge is founded.

DIFFERENT GROUNDS OF PLEAS.

§ 117. A plea may be either to the relief or to the discovery, or both. If it is a good plea to the relief it will be also good to the discovery; in the same manner that a demurrer, which is valid as to the relief prayed, is, as has been already mentioned, good to the discovery sought by the bill.⁴⁸

§ 118. Pleas in equity have been differently divided by writers upon the practice in Courts of Chancery. Lord Redesdale, adopting the usual arrangement, says that they have been generally considered as of three sorts: 1, to the jurisdiction of the Court; 2, to the person of the plaintiff or defendant, and 3, in bar of the suit.⁴⁹ Mr. Beames, in his "Treatise on the Elements of Pleas in Equity," adds a fourth, viz: pleas to the bill. Mr. Beames' arrangement is adopted by Daniell,

⁴⁷ II. Dan. Ch. Pr. 112.

⁴⁸ Ibid. 135. ⁴⁹ Mitf. Pl. 219.

one of the most accurate and systematic writers upon the subject.*

Pleas to original bills for relief.

§ 119. The objections to the relief sought by an original bill which can be taken advantage of by way of plea are nearly the same as those which may be the subject of demurrer; but they are rather more numerous, because a demurrer can extend to such only as may appear on the bill itself, whereas a plea proceeds on other matter. The principal are, 1, that the subject matter of the suit is not within the jurisdiction of a Court of Equity; 2, that some other Court of Equity has the proper jurisdiction; 3, that the plaintiff is not entitled to sue by reason of some personal disability; 4, that

* The following is the arrangement of Beames as cited by Daniell:

I. Those pleas which are commonly called "pleas to the jurisdiction," do not commonly proceed the length of disputing the right of the plaintiff in the subject of the suit, or allege any disability on the part of the plaintiff to prosecute the suit, but simply assert that the Court of Chancery is not the proper Court to take cognizance of those rights. II. Pleas to the person do not dispute the validity of the rights which are made the subject of the suit, or deny that the Court has jurisdiction over them; but they assert that the plaintiff is incapacitated to sue, or that the defendant is not the person who ought to be sued. III. Those pleas in equity, also, which Mr. Beames distinguishes as pleas to the bill, do not dispute the validity of the right made the subject of the suit, or contend that the Court has not generally jurisdiction over it, nor do they allege that the plaintiff is under any disability to sue, or that the defendant ought not to be sued; but they assert that the suit, as it appears on the record, is defective to answer the purpose of complete justice, or ought not, for some other reason, to proceed. IV. Pleas in bar may be distinguished from all other pleas, as they admit the jurisdiction of the Court, and do not dispute the ability of the plaintiff to sue and the liability of the defendant to be sued, and tacitly concede that there are none of those objections to the suit which constitute the grounds of pleas to the bill; but yet they allege matter, which, if true, destroys the claim made by the suit, and, by shewing that the right made the subject of the suit has no existence, or that it is vested in the defendant, they put an eternal end to all litigation respecting it.—See *Beames on Pleas*, 57–65. II Dan. Ch. Pr. 137.

the plaintiff is not the person he pretends to be or does not sustain the character he assumes; 5, that the plaintiff has no interest in the subject or no right to institute a suit concerning it; 6, that he has no right to call on the defendant concerning it; 7, that the defendant is not the person he is alleged to be, or does not sustain the character he is alleged to bear; 8, that the defendant has not that interest in the subject which can make him liable to the demands of the plaintiff; 9, that for some reason founded on the substance of the case, the plaintiff is not entitled to the relief he prays; 10, that the defendant has an equal claim to the protection of a Court of Equity to defend his possession, as the plaintiff has to the assistance of the Court to assert his right;⁵⁰ 11, the deficiency of the bill to answer the purposes of complete justice: this may be shewn by plea; 12, the impropriety of unnecessarily multiplying suits: this may be also the subject of a plea, but the inconvenience arising from confounding distinct matters in the same bill, as it must be apparent in the bill itself, unless very artfully framed, can in general only be alleged by demurrer.⁵¹

Pleas to original bills for discovery.

§ 119 *a*. The objections noted in section 119 as proper grounds of pleas to original bills for relief, likewise extend to discovery wherever it is merely sought for the purpose of obtaining relief and can have no other end.⁵² There are objections, however, which are proper grounds of pleas to discovery only. These are nearly the same as those which have been already mentioned

⁵⁰ Mitf. Pl. 220.

⁵¹ Ibid. 221.

⁵² Ibid. 281.

as causes of demurrer to discovery; they may be, 1, that the plaintiff's case is not such as entitles a Court of Equity to assume a jurisdiction to compel a discovery in his favor; 2, that the plaintiff has no interest in the subject, or not such an interest as entitles him to call upon the defendant for a discovery; 3, that the defendant has no interest in the subject to entitle the plaintiff to institute a suit against him even for the purpose of discovery only; 4, that the situation of the defendant renders it improper for a Court of Equity to compel a discovery.⁵³

FORM OF PLEAS.

§ 120. A plea is preceded by a title in the following form: "The *plea of A. B. a defendant* to the bill of complaint exhibited against him by X. Y." &c.; or "The *joint and several*⁵⁴ *plea of A. B. and C. D. defendants* to the bill of complaint (as before)." When a plea is accompanied by an answer it is entitled thus: "*The plea and answer*," or, "The joint plea and answer," or, "The joint and several plea and answer," according to the circumstances.⁵⁵

§ 121. A plea, like a demurrer, is introduced by a protestation against the confession of the truth of any matter contained in the bill.⁵⁶

§ 122. The extent of the plea, that is, whether it is intended to cover the whole bill or a part of it only, and what part in particular, is usually stated in the

⁵³ Mitf. Pl. 282.

⁵⁴ When it is the plea of man and wife, the words "and several" should be omitted.

⁵⁵ II. Dan. Ch. Pr. 205.

⁵⁶ Ibid. 206.

next place, and this, as before observed, must be clearly and distinctly shewn.⁵⁷

§ 123. In the English Courts, where the plea is to the whole of the relief sought by the bill, but it is necessary that the defendant should support his plea by an answer as to the facts stated, which may avoid the bar, the plea must not extend to the whole bill, but should be in the form of a plea *to all the relief and all the discovery sought by the bill, except certain parts of the discovery*, (which are to be answered.)⁵⁸ This particularity is not required in pleas filed in the Circuit Courts of the United States⁵⁹ or in the Virginia State Courts.

§ 124. The matter relied upon as an objection to the suit or bill generally follows, accompanied by such averments as are necessary to support it; and it is to be noticed that where a plea is of matter which shews an imperfection in the frame of the suit, it should point out in what that imperfection consists.⁶⁰

§ 125. When a plea is accompanied by an answer, the answer should follow the conclusion of the plea.⁶¹

§ 126. Pleas should be signed by counsel. It is not necessary that they be signed by the parties, either in the United States Circuit Courts or in Virginia State Courts.

⁵⁷ II. Dan. Ch. Pr. 206.

⁵⁸ Ibid.

⁵⁹ See XXXVI. and XXXVII. Rules of Supreme Court U. S.

⁶⁰ II. Dan. Ch. Pr. 207. It is hardly necessary to remind the reader that the plea must be founded on matter not apparent on the face of the bill, that the plea must reduce the case to a single point, except where leave has been obtained to plead double, and that it must cover the whole case, or that part of it which it affects to cover.

⁶¹ II. Dan. Ch. Pr. 210.

Special rules of Equity Courts.

§ 127. The rules of the Supreme Court of the United States require that in the United States Circuit Courts other requisites shall be complied with.⁶² The Equity Courts of Virginia have generally adopted rules for their own regimen, which govern the practice in these particulars in the several Courts.

§ 128. The following is the form of a plea of a former suit depending for the same matters, in bar to a bill for account :

The joint and several plea of R. H. and G. H. defendants to the bill of complaint of R. S. and P. D., executors of the last will and testament of J. P. deceased, on behalf of themselves and all other the creditors of G. S. deceased, complainants.

These defendants by protestation, not confessing or acknowledging all or any of the matters and things in the said complainants' said bill mentioned to be true in such manner and form as the same are therein and thereby set forth and alleged, do plead in bar to the said bill, and for cause of plea severally say that the said complainants, together with R. C. since deceased, did in the year 1842 exhibit in this honorable Court their bill of complaint, which was afterwards amended against J. S. and these defendants and G. S. now deceased, and N. N. now deceased, thereby praying, amongst other things, that, &c. [*stating the prayer.*] And these defendants for plea severally further say, that they put in their joint and separate answer to the said amended bill, and which suit is now depending in

⁶² See XXXI. Rule Supreme Court U. S.

this honorable Court; and these defendants do aver that the said bill now exhibited against these defendants by the said complainants is for the same matters as the amended bill before exhibited by the said complainants and the said R. C. deceased, against these defendants and the said J. S. and the said G. S., J. C. and N. N., now respectively deceased, to which these defendants have appeared and answered, and which suit is still depending and undetermined; and therefore these defendants do plead the said former bill and answer in bar to the said complainant's now bill, and humbly pray the judgment of this honorable Court whether they shall be compelled to make any further or other answer thereto. And these defendants pray to be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained.

§ 129. *When pleas sustained and when overruled.*—As in the case of demurrers, so here, it would be a departure from the design of this volume to enter upon this subject in the body of the work. The reader will find, however, in the Appendix, a summary of decisions of general application, in which pleas to bills for relief or for discovery, or for both, have and have not been sustained. See also a subsequent chapter, treating of the filing of demurrers, pleas, &c.

Pleas to bills not original.

§ 130. Pleas have hitherto been considered with reference only to original bills; but the same grounds of plea will hold in many cases to the several other kinds of bills, according to their respective natures,⁶³ and

⁶³ Milt. Pl. 259.

some of them admit of a peculiar defence which may be urged by way of plea.⁶⁴ These will be treated of in the chapters specially devoted to such bills. See also Appendix to this volume.

Procedure on pleas.

§ 131. The Court may allow a plea, or order it to stand for answer, or save the party defendant the benefit of it till a hearing, or overrule it. In some cases, the Court permits the party filing a plea to amend it or to plead *de novo*. See Appendix to this volume; also, a subsequent chapter treating of the filing of demurrers, pleas, &c.

III. ANSWERS.

General nature of answers.

§ 132. If a defendant cannot protect himself, either by demurrer or plea, from answering the plaintiff's bill, and does not disclaim all right and interest in the subject of the suit, he must put in an answer, either to the whole bill, or to such parts of it as are not covered by his demurrer or plea.⁶⁵

§ 133. The answer, besides furnishing the result of an examination of the defendant upon the allegations of the bill, has generally another duty to perform: that of stating to the Court the nature of the defence upon which the defendant means to rely,⁶⁶ in this respect ful-

⁶⁴ *Muz. Pl.* 289.

⁶⁵ *II. Dan. Ch. Pr.* 223.

⁶⁶ It is not true, however, that every defence may be made by way of answer. As we shall see hereafter, sometimes it is necessary for the protection of a defendant that he file a cross bill.

filling the duties of a plea or a series of pleas, either denying facts upon which the plaintiff's equity as stated in the bill arises, or confessing such facts, and avoiding them by the introduction of some new matter from which contrary inferences may be drawn.⁶⁷

§ 134. It is of great importance to the pleader, in preparing an answer, to bear in mind that besides answering the plaintiff's case as made by the bill, he has to state to the Court upon the answer all the circumstances of which the defendant intends to avail himself by way of defence; it being a well established rule that a defendant is bound to apprise a plaintiff by his answer of the nature of the case he intends to set up, and that he cannot avail himself of any matter of defence which is not stated in his answer, even though it should appear in his evidence.⁶⁸

§ 135. It will be well, also, to remember that the plaintiff has a right, even when the facts are uncontroverted, to have notice upon the record, in a precise and unambiguous manner, of the nature of the conclusions to be drawn from them. This, however, does not extend to conclusions in law. It would, as we have seen, be contrary to the principles of correct pleading to set out these. Conclusions of fact are alone intended; and it was decided in a case cited by Daniell, that if a defendant state upon his answer certain facts as evidence of a particular case which he represents to be the consequence of those facts, and upon which he rests his defence, he will not be permitted afterwards to make use of the same facts for the purpose of establishing a different defence from that to which by his answer he

⁶⁷ II. Dan. Ch. Pr. 239.

⁶⁸ Ibid.

has drawn the plaintiff's attention;⁶⁹ but a defendant may, by his answer, set up any number of defences as the consequence of the same state of facts.⁷⁰ He cannot, however, insist upon two defences which are inconsistent with each other, or are the consequences of inconsistent facts.⁷¹

§ 136. While it is necessary in an answer to use such a degree of certainty as will inform the plaintiff of the nature of the case to be made against him, it is not requisite that the same degree of accuracy should be observed in an answer as is required in a bill.⁷²

§ 137. If the defence which can be made to a bill consists of a variety of circumstances, so that it is not proper to be offered by way of plea, or if it is doubtful whether a plea will hold, the defendant may set forth the whole by way of answer, and pray the same benefit of so much as goes in bar as if it had been pleaded to the bill. So, also, if the defendant can offer a matter of plea which would be a complete bar, but has no reason to protect himself from any discovery sought by the bill, and can offer circumstances which he conceives to be favorable to his case, and which he could not offer together with a plea, he may set forth the whole matter in the same manner, and, at the hearing, any such benefit may be relied upon.⁷³

⁶⁹ See II. Dan. Ch. Pr. 240.

⁷⁰ Ibid. 241.

⁷¹ II. Dan. Ch. Pr. 241. *Jesus College vs. Gibbs*, 1 Younge & Coll. 145; *Leech vs. Bailey*, 6 Price 504. From these cases, says Daniell, it may be collected that where a defendant sets up by his answer two inconsistent defences, the result will be to deprive him of the benefit of either, and to entitle the plaintiff to a decree. *But see Nagle v. Edwards*, 3 Anst. 702.

⁷² II. Dan. Ch. Pr. 244.

⁷³ Ibid. 244, 245; but not until the hearing of the cause. Ibid.

Matter of answer.

§ 138. The defendant is required, upon his corporal oath, to make a full, true, direct, perfect and sufficient answer, according to the best of his knowledge, recollection, information and belief, to all and singular the several matters and things contained in the bill.⁷⁴

§ 139. The answer of the defendant should, therefore, as a general rule, be fully responsive as to all matters and statements in the bill against which he does not protect himself by plea or demurrer;⁷⁵ but there are some exceptions to this rule.

§ 140. Thus, a defendant is not bound to answer to matters which are purely scandalous, or impertinent, or immaterial, or irrelevant;⁷⁶ he is not bound to answer to anything which may subject him to any penalty, forfeiture or punishment;⁷⁷ he is not bound to answer what would involve a breach of professional confidence;⁷⁸ he is not bound to discover the facts respecting his own title, but merely those which respect the title of the plaintiff.⁷⁹

§ 141. From what has been said, it is apparent that a defendant who submits to answer must answer fully: he must answer the whole of the statements and charges in the bill,⁸⁰ and all the interrogatories founded upon

⁷⁴ This general rule is limited in the United States Circuit Courts to such interrogatories as the defendant is specially called upon to answer XL. Rule Supreme Court U. S.

⁷⁵ IL. Dan. Ch. Pr. 238, *et seq.* Story's Eq. Pl. s. 846.

⁷⁶ Story's Eq. Pl. s. 846.

⁷⁷ Ibid.

⁷⁸ Ibid.

⁷⁹ Ibid.

⁸⁰ But see XL. Rule Supreme Court U. S. for practice in this respect in the United States Circuit Courts.

them, at least so far as they are necessary to enable the plaintiff to have a complete decree against him.⁸¹

§ 142. When it is said that a defendant who answers should answer fully to all the matters in the bill, it must be understood only as to matters which are *well pleaded*, that is, to the facts stated and charged. To matters of law, or inferences of law drawn from the facts, he need not answer.⁸²

§ 143. In general, if a fact is charged which is in the defendant's own knowledge, as if done by himself, he must answer positively, and not to his remembrance or belief only.⁸³

§ 144. A defendant cannot, by merely saying "that a matter may be true for any thing he knows to the contrary," avoid stating what is his recollection, information, or belief with reference to it, or stating that he has no recollection or information, or that he cannot form any belief at all concerning it, either in these words or in equivalent expressions; and where defendants have in their power the means of acquiring the information necessary to give the discovery called for, they are bound to make use of such means, whatever pains or trouble it may cost them.⁸⁴

§ 145. To so much of the bill as it is necessary and material for the defendant to answer, he must speak directly and without evasion; and must not merely answer the several charges literally, but he must confess or traverse the substance of each charge.⁸⁵

⁸¹ II. Dan. Ch. Pr. 247.

⁸² Ibid. 256.

⁸³ Ibid. 256.

⁸⁴ II. Dan. Ch. Pr. 247.

⁸⁵ Ibid. 258.

§ 146. As in other pleadings in equity, so in the case of answers; they should not contain impertinent, irrelevant or scandalous matter.⁸⁶

Form of answers.

§ 147. Two or more persons may join in the same answer, and where their interests are the same, and they appear by the same counsel, they ought to do so, unless some good reason exists for their answering separately.⁸⁷ Where two defendants answer jointly, and one speaks positively for himself, the other may, in cases where he is not charged with any thing upon his own knowledge, say that he perused the answer and believes it to be true; but it is otherwise where the defendants answer separately.⁸⁸

§ 148. An answer is headed by a title: "The answer of A. B. the defendant, to the bill of complaint of C. D. complainant." If two or more defendants join in the same answer, it is entitled, "the joint and several answer," &c., unless it be the answer of a man and wife, in which case it is called the joint answer. The answer of an infant, or other person answering by guardian, or of idiot or lunatic, or convict answering

⁸⁶ II. Dan. Ch. Pr. 295. Daniell mentions a case in which the bill having called upon the defendant to set forth an account of all and every the quantities of ore, metals, &c., dug in particular mines, and the full value thereof, and the costs of working the mines and the clear profits thereby, the defendant put in a schedule with his answer, comprising 3431 folios; wherein were set forth all the particular items of every tradesman's bill connected with the mines! The Court held the schedule to be impertinent. II. Dan. Ch. Pr. 263. See a case of scandal and impertinence in answers in the Appendix to this volume.

⁸⁷ See LXII. Rule-Supreme Court U. S.

⁸⁸ II. Dan. Ch. Pr. 266.

by his committee, is so entitled,⁸⁰ and when a defendant is sued in two characters it ought to appear that he answers in both.⁸⁰

§ 149. Where an answer has been prepared for five defendants, it cannot be received as the answer of two only, nor can it be received as the answer of six.⁸¹

§ 150. An answer usually begins by a reservation to the defendant of all advantage which may be taken by exception to the bill; a form which is conjectured to have been intended to prevent a conclusion that the defendant, having submitted to answer the bill, admitted every thing which by his answer he did not expressly controvert, especially such matter as he might have objected to by demurrer or plea.⁸²

§ 150 *a*. Next after this reservation follow the answers to the several matters contained in the bill, together with such additional matter as may be necessary for the defendant to show to the Court, either to qualify or add to the case made by the bill, or to state a new case on his own behalf.⁸³

§ 151. The answer usually contains a denial of the combination charged in the bill, and it is in the English Courts the universal practice to add, by way of conclusion, a general traverse or denial of all the matters in the bill.⁸⁴

§ 152. In strict practice, an answer should be signed by the counsel and the defendant or defendants putting it in; but this rule is rarely observed, either in the

⁸⁰ II. Dan. Ch. Pr. 266.

⁸¹ But see *Kinney's ex'ors, &c. v. Harvey, &c.*, 2 Leigh, 76.

⁸² II. Dan. Ch. Pr. 267. ⁸³ Ibid. 267. ⁸⁴ Ibid. 268. ⁸⁵ Ibid. 268.

Virginia State Courts, or in the United States Circuit Courts.

§ 153. All answers, excepting those of corporations aggregate, which are put in under their common seal, must be upon the oath of the parties putting them in, unless they be such as by the law are allowed to make a solemn affirmation in lieu of an oath.⁸⁵ Upon consent of the plaintiff, however, an answer may be put in without oath or affirmation.⁸⁶

Amending answers.

§ 154. After an answer has been put in upon oath, the Court will not, for obvious reasons, readily suffer any alterations to be made in it.⁸⁷ The application to amend will be narrowly and closely inspected, and a just and necessary case must be clearly made out,⁸⁸ but no precise and absolute rule exists on the subject; the question is always addressed to the discretion of the Court in the particular instance.⁸⁹

Special rules of Equity Courts.

§ 155. The Rules of the Supreme Court of the United States, found in the Appendix, should be observed in the preparation of answers in the Circuit Courts of the United States, and the several Equity Courts of Vir-

⁸⁵ II. Dan. Ch. Pr. 290. See form of oath or affirmation in Appendix.

⁸⁶ The Court will not permit the answer of a defendant represented to be in a state of incapacity to be received without oath and signature, though a mere trustee and without interest; the usual course in such case being for the Court to appoint a guardian, by whom the defendant may answer. *Wilson v. Grace*, 14 Ves. 172; II. Dan. Ch. Pr. 271.

⁸⁷ II. Dan. Ch. Pr. 337.

⁸⁸ II. Rob. Pr. 316, and cases there cited.

⁸⁹ *Wells v. Wood*, 10 Ves. 401. See post. chapter on "Amendments of pleadings, &c."

gins have generally adopted rules in regard to answers, which govern the practice in this particular in these Courts.

§ 156. There will be found in the Appendix the forms of answers *in extenso*, as filed in the English Courts, in the Circuit Courts of the United States, and in the Virginia State Courts.

Procedure on answers.

§ 157. If, when the answer is filed, the plaintiff finds that it contains scandalous or impertinent matter, or that it does not sufficiently answer the allegations and charges in the bill, he should file exceptions to it.¹⁰⁰

§ 158. The plaintiff, if he is not inclined to file exceptions, may reply. The special replication has become obsolete in England, and is not in use here. The general replication is in force yet, and, as it brings the parties fully to issue, we do not see that the rejoinder is of any utility. The rejoinder is not in practice in the United States Circuit Courts or in the Virginia State Courts. If the plaintiff file no replication (not having excepted) to the answer, he admits thereby the truth of its statements.

IV. DISCLAIMERS.

§ 159. A disclaimer is where a defendant, upon oath or solemn affirmation, denies that he has or claims any right to the thing in demand by the plaintiff's bill, and disclaims, i. e., renounces, all claim thereto.¹⁰¹

¹⁰⁰ II. Dan. Ch. Pr. 295. In the Appendix the reader will find a summary of cases in which the sufficiency of answers has been tested by the Courts: in some instances sustaining them, in others requiring new answers:

¹⁰¹ II. Dan. Ch. Pr. 233.

160. A disclaimer is distinct in substance from an answer, although sometimes confounded with it; but it can seldom be put in without an answer; for if the defendant has been made a party by mistake, having had an interest which he may have parted with, the plaintiff may require an answer sufficient to ascertain whether that is the fact or not;¹⁰² and it may be laid down as a general rule, that in no case can a party get rid of his liability to answer a bill by his mere disclaimer, if his answer may properly, under all the circumstances, be required.¹⁰³

§ 161. Though a disclaimer is, in substance, distinct from an answer, yet it is in point of form an answer,¹⁰⁴ and is preceded and concluded by the same formal words and is put in and filed in the same way,¹⁰⁵ and the subsequent proceedings in reference thereto by the plaintiff may be of the same kind as if it were an answer;¹⁰⁶ with this exception, that if it be a disclaimer to the whole bill, the plaintiff ought not to reply to it.¹⁰⁷

§ 162. After a disclaimer to the whole bill has been filed, the plaintiff may either dismiss the bill as against the party, or amend it.¹⁰⁸

§ 163. This form of equity defence is rarely used in the practice in this country, either in the United States Courts or in the State Courts.

§ 164. In the ninety-sixth section it was stated that the several modes of defence herein-before treated of,

¹⁰² II. Dan. Ch. Pr. 233. Story's Eq. Pl. s. 838.

¹⁰³ Ib. s. 838a.

¹⁰⁴ Forms of disclaimers may be found in the Appendix to this volume.

¹⁰⁵ II. Dan. Ch. Pr. 234.

¹⁰⁶ Ibid. 235.

¹⁰⁷ Ibid.

¹⁰⁸ Ibid.

or any of them, may be used together, if applied to separate and distinct parts of the bill.

§ 165. The rule that two or more of these defences may not be united, if applicable to the same part of the bill, prevails in the United States Circuit Courts and in most of the State Courts of the Union. In a case in the Supreme Court of Appeals in Virginia, however, it was decided that a defendant might demur and answer to the same matter in the bill. *See Bassett's adm'or, &c. v. Cunningham's adm'or, 7 Leigh, 402.* And if the principle of that case be adopted, and carried out to its legitimate extent, a defendant in the Virginia State Courts may plead and demur, or plead and answer, to the same matter of a bill at the same time. It is proper to state, that this decision was founded upon a special statute of Virginia, declaring that in all actions at law the defendant may plead as many several matters, *whether of law or fact*, as he shall think necessary for his defence. The Court thought that this rule ought, by analogy, to be extended to the proceedings in Courts of Equity. Judge Tucker dissented from this opinion.

§ 166. Beside these several modes of defence treated of in this chapter, it sometimes becomes necessary that a party defendant, fully to present his case before the Court, should file a cross bill. In a subsequent chapter cross bills will be treated of.

CHAPTER V.

Of the filing of demurrers, pleas, answers, and disclaimers, and of the course of the plaintiff when such defences are made.

§ 167. The subjects of this chapter have been already treated of in previous parts of this work. It is deemed proper, however, to devote further sections to their more particular consideration.

§ 168. Either of the several defences set forth in the fourth chapter may, under the limitations there pointed out, be made in the Virginia State Courts at any stage of the suit before final decree,¹ and, in the United States Circuit Courts, at any time before the bill is taken for confessed, or, afterwards, with the leave of Court, and, as we have stated before, all or any of the several modes of defence may be joined, provided each relates to a separate and distinct part of the bill;² but there are cases in which the taking of one of these modes of defence precludes the party from subsequently taking another.

§ 169. Thus, after a demurrer to the whole bill has been overruled, the defendant is not at liberty to put

¹ Code of Va., chap. 171, sec. 34. The rule is different in the English Courts. II. Dan. Ch. Pr. 78, *et seq.*

² See *ante*, sec. 165, where it is stated that in the Virginia State Courts, according to a decision of Court of Appeals, a party defendant may both answer and demur to the same matter in the bill.

in a plea to the whole bill, or to any part of it, or to put in a demurrer of a less extended nature, without first obtaining the leave of the Court,³ though he may then put in his answer without such leave.

§ 170. So, too, after answering the bill, though generally speaking the party may insist at the hearing upon any matter of peremptory or permanent defence which he might have relied upon by plea or demurrer, yet he will not be allowed to file a plea or demurrer.

§ 171. In the United States Circuit Courts the practice in regard to the filing of demurrers or pleas is much stricter than in the Virginia State Courts. The rules governing the practice in those Courts provide that no demurrer or plea shall be allowed to be filed, unless upon a certificate of counsel that in his opinion it is well founded in point of law, and supported by the affidavit of the defendant that it is not interposed for delay, and, if a plea, that it is true in point of fact.⁴

§ 172. The rule has been generally adopted in the Virginia State Courts, that all pleadings should be signed by the party filing them and by his counsel.

How demurrers, pleas, &c. filed.

§ 173. Demurrers, general or special, in equity, are committed to writing, as well as pleas, answers, or disclaimers, both in the Virginia State Courts and in the United States Circuit Courts.⁵

³ II. Dan. Ch. Pr. 94, 5. See Code of Va. chap. 171, sec. 32.

⁴ XXXI. Rule Supreme Court U. S.

⁵ See *ante*, sec. 104, 105, and chap. IV: *passim*.

§ 174. These several modes of defence may be made at the rules or in Court, in term time, both in the United States Circuit Courts and in the Virginia State Courts.

§ 175. When a demurrer is filed, if the plaintiff does not think proper to amend his bill, he should set the demurrer down for argument.⁶ When a plea is filed, the plaintiff may take issue upon the plea; (i. e., he may deny the facts stated in it,) or he may set it down for argument.⁷ When an answer is filed, the plaintiff must either file a general replication, or except to the answer as insufficient, [or, in the Virginia State Courts, may set the cause for hearing on the answer alone, without replication.⁸]

§ 176. *What done if plaintiff fail to set demurrer or plea down for argument.*—In the United States Circuit Courts, if the plaintiff do not reply to any plea or set down any plea or demurrer for argument on the rule day when the same is filed, or on the next succeeding rule day, he will be deemed to admit the truth and sufficiency thereof, and his bill will be dismissed as of course, unless a Judge of the Court shall allow him further time for the purpose.⁹ In the Code of 1819, there was a similar rule adopted for the Virginia State Courts. It ran thus: "If the complainant shall not proceed to reply to or set for hearing any demurrer or plea before the second Court after filing the same,

⁶ Code of Va., chap. 171, sec. 32. XXXIII. Rule Supreme Court U. S.

⁷ Code of Virginia, chap. 171, sec 32, 33. XXXIII. Rule Supreme Court U. S.

⁸ Code of Virginia, chap. 171, sec. 48.

⁹ XXXVIII. Rule Supreme Court U. S.

SUIT IN EQUITY.

may be dismissed of course with costs."¹⁰ In of Virginia, of 1849, this provision has been omitted.

§177. *When demurrer or plea set down for argument and overruled.*—In the United States Circuit Courts, if any demurrer or plea, on the hearing, is overruled, besides paying the plaintiff his costs in the cause up to that period, (unless the Court is satisfied that the defendant had good ground in point of law or fact to interpose the same, and it was not interposed vexatiously or for delay,) the defendant will be assigned to answer the bill, or so much thereof as is covered by the plea or demurrer, the next succeeding rule day, or at such other period, as, consistently with justice and the rights of the defendants, it can, in the judgment of the Court, be reasonably done; in default whereof, the bill will be taken for confessed, and the matter proceeded in and decreed accordingly;¹¹ and, in the Virginia State Courts, if a demurrer or plea be overruled, no other plea or demurrer will afterwards be received, but there will be a rule upon the defendant to answer the bill.¹²

§178. *When demurrer or plea sustained.*—If, upon the hearing, in the United States Circuit Courts, any demurrer or plea shall be allowed, the defendant will be entitled to costs; but the Court may, in its discretion, upon motion of the plaintiff, allow him to amend his bill upon such terms as it shall deem reasonable.¹³ The Virginia statutes have made no express provision for such a case in the Virginia State Courts. It is pre-

¹⁰ 1 R. C. 1819, p. 215, § 99.

¹¹ XXXIV. Rule Supreme Court U. S.

¹² Code of Va. chap. 171, sec. 32.

¹³ XXXV. Rule Supreme Court U. S.

sumed, however, that the defendant would have his costs, and the plaintiff, upon a proper case shewn, would be allowed to amend the bill.

After a plea has, upon argument, been adjudged good, a party plaintiff will be allowed to take issue on it.¹⁴

§ 179. *When issue taken upon a plea.*—The Virginia statute provides that a plaintiff in equity in the Virginia State Courts may take issue upon a plea, and have such issue tried by a jury; and, if the plea be found false, he shall have the same advantages as if it had been so found by verdict at law;¹⁵ and by the 32d rule of the United States Supreme Court, it is ordered that the plaintiff may take issue on the plea, and if, upon an issue, the facts stated in the plea be determined for the defendant, they shall avail him as far as in law and equity they ought to avail him.

§ 180. As stated in 17th section, after a plea has upon argument been adjudged good, a party plaintiff will be allowed to take issue on it; and it seems that if, after an issue, the facts relied on by the plea are proved, and the plea is to the whole [matter of the] bill, a dismissal of the bill at the hearing is a matter of course.¹⁶

§ 181. *Replications to answers.*—Special replications to answers are now out of use both in England and this country;¹⁷ their place is supplied by an amendment of

¹⁴ Mitf. Pl. 301.

¹⁵ Code of Va. chap. 171, sec. 33.

¹⁶ *Hughes v. Blake*, 1 Mason 515, 6 Wheat. 473; *Dows, &c. v. M'Michael*, 2 Paige 345; *Holmes, &c. v. Remsen, &c.*, 7 John. Ch. Rep. 290.

¹⁷ The office of the special replication was to reply specially on the part of the plaintiff to any new matter introduced in the defendant's plea or answer. II. Dan. Ch. Pr. 387.

SUIT IN EQUITY.

when necessary.¹⁸ General replications are reduced to writing, is as follows:*

The replication of A. B. complainant to the answer of C. D. defendant.

This repliant, saving and reserving unto himself all and all manner of advantage of exception to the manifold insufficiencies of the said answer, for replication thereunto saith, that he will aver and prove his said bill to be true, certain and sufficient in the law to be answered unto, and that the said answer of the said defendant is uncertain, untrue and insufficient to be replied unto by this repliant; Without this, that any other matter or thing whatsoever in the said answer contained material or effectual in the law to be replied unto, confessed and avoided, traversed or denied, is true; All which matters and things this repliant is and will be ready to aver and prove as this honorable Court shall direct, and humbly prays as in and by his said bill he hath already prayed.

§ 182. *When plaintiff not compelled to file replication, and effect of not filing it.*—A plaintiff, in the Virginia State Courts, may have the cause set for hearing on the defendant's answer alone;¹⁹ and it seems that if this be done, the answer will be taken as true in every

¹⁸ XLV. Rule Supreme Court U. S.

* Usually, in the Virginia State Courts, general replications are put in informally with the clerk *ore tenus*; they are rarely, if ever, reduced to writing; this, too, is the practice in the United States Circuit Court held in Richmond city, Virginia. Whether this is a sufficient conformity to the rules of the Supreme Court of the United States has not yet been decided by that Court.

¹⁹ See Code of Va. chap. 171, sec. 48.

part of it.²⁰ In the United States Circuit Courts, the plaintiff must either file exceptions or a general replication. He is allowed until the rule day next succeeding the filing of the answer to file the general replication or exceptions, and if (not having filed exceptions) he omit or refuse to file a general replication within that time, the defendant will be entitled to an order, as of course, for a dismissal of the suit.²¹

§ 183. *When replication ought to be filed.*—If the party intends to except to the answer, he ought to do so before filing a replication.²² The Court will not, after a replication, allow the plaintiff to withdraw it, for the purpose of excepting to the answer, without good cause shown.²³

§ 184. As we have before seen, in the United States Circuit Courts, the plaintiff is allowed one rule day after filing of answer to file replication.²⁴ In the Virginia State Courts there is no obligation on a plaintiff to file a replication, but if four months elapse after the answer of a defendant is filed, without the cause being set for hearing by the plaintiff and without exceptions being filed to the answer, the defendant may have the cause set for hearing as to himself,²⁵ and, we presume,

²⁰ II. Rob. Pr. 312, and cases there cited.

²¹ LXI. and LXVI. Rules Supreme Court U.S. Upon good cause shewn, however, the Court or Judge may allow a replication to be filed *nunc pro tunc*, the plaintiff submitting to speed the cause, and to such other terms as may be directed. See LXVI. Rule Supreme Court U. S.

²² A party by replying admits the sufficiency of the answer. *Brown v. Richards, &c.*, 2 John. Ch. Rep. 426.

²³ See note 21. See II. Rob. Pr. 316.

²⁴ See *ante*, sec. 182.

²⁵ Code of Virginia, chap. 171, sec. 48.

if in such case a replication be not filed, the allegations of the defendant in his answer will have the same force as if the cause had been set for hearing by the plaintiff without replication.²⁶

§ 185. *Rejoinders.*—Rejoinders to replications are out of use in this country.²⁷

Exceptions to answers.

§ 186. These ought regularly to be filed before a replication, but, even after replication, upon good cause shewn, the Court will allow the replication to be withdrawn, and permit the plaintiff to file exceptions to the answer.²⁸

§ 187. *When exceptions to answers ought to be filed.* As to the rules governing the filing of exceptions to answers and the proceedings thereon in the United States Circuit Courts, see the 61st, 62d, 63d, 64th and 65th rules of the United States Supreme Court, printed in the Appendix to this volume. In the Virginia State Courts, each Equity Court prescribes rules for its own regimen, and these should be consulted as regards this point.*

²⁶ This question will hardly arise in the Virginia State Courts, it being the practice of clerks in these Courts to enter a general replication to an answer as a matter of course.

²⁷ It would seem that the utility of rejoinders had ceased with the abandonment of special replications, and accordingly the practice of filing rejoinders in the English Courts is quite rare, though the subpoena to rejoin yet continues. II, Dan. Ch. Pr. 392.

²⁸ *Ante*, sec. 183, 2 John. Ch. Rep. 425.

* In the Virginia State Courts the plaintiff has four months after the filing of an answer in which to file exceptions, if the cause be at rules. We see no reason why the same length of time should not be allowed him, if the defendant files his answer by special leave of the Court, after the cause has been set for hearing.

§ 188. Exceptions to answers are proper in all cases where the answers are defective or evasive, or scandalous and impertinent. As to the extent to which answers should respond to the allegations of the bill, see Appendix. Scandal and impertinence in answers are of the same character with scandal and impertinence in other pleadings. See *ante*, sec. 20, and Appendix to this volume.

§ 189. Exceptions to answers must be in writing and signed by counsel, and should state with precision and accuracy the points in which the defendant's answer is deemed defective or evasive, scandalous or impertinent.²⁰

§ 190. The following is the form of exceptions filed to an answer in Chancery :

In Chancery.

Between W. W., J. W., and C. L., on behalf
of themselves and all other the creditors of
J. B. who shall come in and contribute to
the expense of this suit, - Complainants,
and
J. G. and T. B., - Defendants.

An exception taken by the said complainants to
the insufficient answer of the said defendants.

For that the said defendants have not, to the best of their knowledge, remembrance, information and belief, answered and set forth a full, just and true inventory and account of all and singular the goods and chattels, personal estate and effects whatsoever, which J. B. the

²⁰ Barten's Suit in Equity, by Holcombe, 115.

younger, in the said bill named, was possessed of, entitled to, or interested in at the time of the date of the indenture in the said bill mentioned, and all the particulars whereof the same consisted, and the quantities, qualities, full, real and true values thereof and of every such particulars; and whether all or some and which of such particulars have not, and when, been possessed or received by or come to the hands of them the said defendants, or the one and which of them, or some and what person or persons, by their or either of their order or for their or either of their use, and how and in what manner and when and where and by and to whom and for how much the same and every or any and what part thereof, hath been sold and disposed of; And whether any and what parts thereof, and to what value or amount, now remain undisposed of, and what is become thereof.

In all which particulars the said complainants except to the answer of the said defendants as evasive, imperfect and insufficient, and humbly pray that the said defendants may be compelled to put in full and sufficient answer thereto.

§ 191. *Exceptions set down to be argued.*—See 63d rule of United States Supreme Court as to practice in in United States Circuit Courts. In Virginia State Courts, as soon as exceptions are filed, the statute requires them to be set down for argument.³⁰

§ 192. *Exceptions sustained.*—If exceptions be put in to an answer for scandal or impertinence, and the exceptions be sustained, the usual course is to refer the

³⁰ Code of Va. ch. 171, sec. 35.

answer to a master or commissioner to expurgate the scandalous or impertinent matter, at the expense of the party filing the answer.³¹

§ 193. If exceptions for insufficiency or evasiveness be sustained, the party will be required to answer anew;³² and, in the United States Circuit Courts, should he fail to do this on the next succeeding rule day, the plaintiff as of course will be entitled to take the bill so far as the matter of such exceptions is concerned, as confessed, or, at his election, he may have a writ of attachment to compel the defendant to make a better answer to the matter of the exceptions; and the defendant, when he is in custody upon such writ, will not be discharged therefrom but by an order of the Court or of a Judge thereof, upon his putting in such answer and complying with such other terms as the Court or Judge may direct.³³

In the Virginia State Courts, if exceptions to an answer have been sustained, the defendant will be required to put in a second answer, and if the second answer be adjudged insufficient, he may be examined upon interrogatories and committed until he answers them.³⁴

§ 194. *Disclaimers*.—The defence by disclaimer is so rarely used in this country, that nothing further need be said of it than what is contained in the fourth chapter of this work.

³¹ 1 New Ch. Pr. pp. 152, 275. This was done in *Mason v. Mason et al.* by Chancellor Taylor, though in that case no exceptions were filed. 4 Hen. & Mun. 414.

³² See Code of Virginia, chap. 171; also Rules of Supreme Court U. S., published in Appendix to this volume.

³³ LXIV. Rule Supreme Court U. S.

³⁴ Code of Virginia, chap. 171, sec. 36.

CHAPTER VI.

Of Evidence.

§ 195. For the present, we shall not treat of the interlocutory proceedings which are necessary in almost all suits in Equity, such as the compelling the production of documents, the payment of money into Court, the appointment of a receiver, &c., or inquire into the incidental circumstances which may occur to alter the state of the original parties, or the relation in which they stood to each other at the commencement of the proceeding, necessitating new pleadings to adapt them to the change of circumstances, but we shall proceed at once to consider of such suits, as if there were no need for such interlocutory proceedings and no incidental circumstances of the kind alluded to, and, of consequence, no change in the pleadings, necessary to bring all parties fully at issue before the Court.

§ 196. As at common law, so in Equity, the parties litigant may be at issue upon pure questions of law or pure questions of fact, or upon questions mingling both law and fact. They are at issue upon pure questions of law when the whole case is presented by a demurrer and no other defence is taken, but in other defences there may be an issue either upon the law or the facts of the case, pure or mixed.

§ 197. Whenever there are questions of fact at issue between the parties, each litigant may prove by legitimate evidence as many of the facts alleged in his plead-

ings as are material to the decree asked or resisted, in the manner set forth in the following sections.

§ 198. The rules of evidence are the same in equity as at common law. The facts proved ought to be material to the decree sought for or resisted,¹ and should be established by legitimate evidence.² The evidence should be confined to matters in issue;³ the case as proved must be substantially the same with that stated upon the record;⁴ and generally, as at law, the burden of proof rests upon the party asserting the affirmative.⁵

§ 199. It would be a departure from the design of this work to enter at large upon the discussion of the question, What is legitimate evidence? It should be noted, however, as a peculiarity of Equity Courts, that while by the ordinary rules of evidence in courts of common law a party on the record is an incompetent witness in all cases,* in Courts of Equity, on the contrary, any party who is made a defendant for form's sake in a cause in which no decree can be obtained which he has any beneficial interest in resisting, or where he has by his answer submitted to a decree, and has therefore ceased to have such interest, or where,

¹ Adams's Equity, 362.

² Ibid. 363.

³ II. Dan. Ch. Pr. 410.

⁴ Ibid. 419.

⁵ Ibid. 408. There are exceptions to this rule. When, for instance, a *prima facie* right is proved or admitted by the pleadings, the burden of proof is always upon the person calling such right in question, (II. Dan. Ch. Pr. 409,) even though it devolves upon him the necessity of proving a negative. (Ibid.)

* There are express statutes making parties on the record competent witnesses in certain cases. Of course, where such statutes are in force, they override the general rule mentioned in the text.

though having an interest, he has it in respect of a part only of the matters in issue, ~~he~~ may be examined as a witness, either generally or in respect to those matters in which he has no interest.⁶

§ 200. The rule in Equity just mentioned must be restricted to parties defendant; a party plaintiff is in all cases incompetent as a witness, and if a co-plaintiff desires his evidence, and the defendant will not consent to the examination, the party must move for leave to strike out his name as plaintiff on payment of the costs already incurred, and make him a defendant by amendment; if the examination of a plaintiff is required on behalf of a defendant, it can only be had by the plaintiff's consent.⁷

§ 201. It should be further noted, as a peculiarity pertaining to pleadings in Courts of Equity, that as a general rule the statements of the answer of the defendant, so far as responsive to the allegations of the bill, are to be taken as true, unless contradicted by two witnesses, or one witness with strong corroborating circumstances.⁸ This rule imposes an additional burden on the party plaintiff, and to the same extent relieves the party defendant from the necessity of proving the statements in his answer directly responsive to the bill.

⁶ Adams's Equity, 364. In the cases mentioned in the text, by the practice generally prevailing in Equity Courts, special liberty should be obtained to examine the party as a witness, saving just exceptions; and the application is usually accompanied by a suggestion that the party to be examined has no interest. Ibid.

⁷ Adams's Equity, 365.

⁸ II. Dan. Ch. Pr. 404, 405. The principle announced in the text has been affirmed again and again in Courts of Equity in this country.

§ 202. The mode of taking evidence at equity differs from that adopted in common law causes. It is taken at law *viva voce* and publicly; in equity, it is written,* and, in the English practice, it is secret. The origin of this distinction in the manner of taking testimony at common law and in equity, is thus unfolded by Adams in his late treatise:

“The object at law is to enable the jury to give their verdict on the issues joined between the parties. They are not required to decide on the merits of the case generally, or to elicit a legal conclusion from a series of facts, but are to give their verdict on the balance of testimony, affirmative and negative, direct and indirect, submitted to them on the issues joined. In order, therefore, that this object may be best attained, it is necessary, not that the evidence should be correctly recorded, but that at the time of its being given it should be thoroughly compared and sifted; and this is done by an examination *viva voce* and in public. The jury are thus aided by the tone and manner of the witness, as well as by his actual assertions. They have, in a comparatively short time, the witnesses on both sides brought under their notice, their inaccuracies or obscurities corrected or explained, and the entire mass

* The general rule is that found in the text. By special act of Congress, in the United States Courts, the mode of proof by oral testimony, and examination of witnesses in open court, shall be the same, as well in the trial of causes in Equity as of actions at common law. Act Sept. 24, 1789, sec. 30. And by statutes of Virginia, in certain cases, written testimony, i. e. depositions, may be read at common law. Sometimes, in the English Courts, an examination *viva voce* at the hearing is admitted in Equity causes, where written documents essential to the justice of the cause have been neglected to be proved before publication has passed in the suit, or where the plaintiff proceeds to a hearing of the cause upon bill and answer only. II. Dan. Ch. Pr. 441.

of evidence commented on by counsel, and summed up by the Judge, and the danger of mistake or misapprehension in the witnesses, as well as that of a deliberate perjury, is partly remedied by the solemnity of a public trial, and in a still greater degree by the searching ordeal of cross-examination. The verdict, when given, is added to the record, but there is no judicial record of the evidence. If the verdict is complained of as being against the evidence, the private notes of the Judge, or the admissions of counsel, are the only materials furnished to the Court; and if the Court in its discretion grants a new trial, such new trial must take place as on a new issue, before a new and independent jury, who will decide according to the evidence laid before themselves. If the verdict is undisturbed, but its legal effect on the question in dispute is doubted, that, as a question of law, must be decided by the Court; but, for the purpose of such decision, as well as of any subsequent appeal, the verdict only, and not the evidence, appears upon the record.

“In a Court of law, therefore, a *viva voce* examination in public is the regular mode of proof. In Equity the object of the evidence is different, and so also is the mode of taking it.

“The trial and determination of disputed issues are not the principal objects of evidence in equity; for the nature of the questions there litigated does not generally give rise to such issues; and those which do occur, if they present any serious difficulty of trial, are generally referred to the verdict of a jury. The power, therefore, of sifting and comparing testimony, which is the primary requisite at law, becomes comparatively unimportant in equity: and the principal objects there

contemplated, are, first, to elicit a sworn detail of facts, on which the Court may adjudge the equities; and secondly, to preserve it in an accurate record, for the use, if needed, of the Appellate Court.

“For this reason it is required in equity that all witnesses shall be examined before the hearing, and their answers taken down in writing, so that, when the cause comes on for decision, the Judge may not be distracted by the trial of separate issues on evidence then brought forward for the first time, but may give his undivided attention to the decree which the facts admitted or proved will warrant; and that, if his decree be appealed from, the Court of Appeal may have, in an authorized record, all the materials on which it is founded.

“The protracted nature of a written examination necessarily involves the risk that defects of evidence might be discovered in the course of taking it, and false testimony procured to remedy them. In order to avoid this risk, the witnesses are examined privately by an officer of the Court; and it is an imperative rule, that until the examination has been completed and the entire depositions given out, which is technically termed passing publication, neither party shall be made acquainted with his adversary's interrogatories, nor with any part of the answers on either side; and that, after publication, no further witnesses can be examined without special leave.”

§ 203. The practice of English Courts in this regard, as thus set forth by Adams, has been very much relaxed in this country. While, as we shall see in future sections, by the rules governing the practice in Circuit Courts of the United States, certain formalities are re-

quired previous to "passing publication," of the testimony, after it has been taken and returned to the clerk's office, in the Virginia State Courts these are not necessary, the depositions as soon as returned being open to the inspection of all parties.

§ 204. As already stated, it is only necessary that proof should be adduced on those points as to which the parties are at issue. If a party, either actually or constructively, has admitted all or any of the statements of his opponent, no proof is required as to such statements.

§ 205. Thus, the facts alleged in a bill, where they are alleged positively and not by way of pretence, are constructive admissions in favor of the defendant of the facts so alleged, and need not be proved by other evidence;⁹ and so, on the other hand, when a plea has been put in by a defendant either to the whole bill or a part of it, in that case, the bill, or that part of it which is pleaded to, so far as not controverted by the plea, is admitted to be true, and the plaintiff may rest satisfied with the admission.¹⁰ Actual admissions, of course, need not be proved, for what better evidence of the truth of a statement can a court desire, than the assent of the party chiefly interested in denying it?

§ 206. There is a class of documentary evidence which proves itself, needing nothing more than the production of the documents, while another class requires the support of parol testimony before it can be received. Of the former class, public acts of Congress and of the State legislatures, certified under the hand of the proper officer, and the records and judicial proceedings of the

⁹ 11 Dan. Ch. Pr. 396.

¹⁰ Ibid.

several State and Federal Courts in the Union or certified copies of the same are examples, and in the latter class are embraced all private documents, such as letters, agreements not of record, and the like.¹¹

HOW TESTIMONY TAKEN.

§ 207. In the English Courts, save in the special case of *viva voce* examination to prove written documents at the hearing mentioned in a note to a previous section,¹² the uniform mode of examining witnesses is by interrogatories in writing, exhibited by the party plaintiff or defendant, or directed by the Court to be proposed to or asked of the witnesses in the cause;¹³ the examination to be conducted either by an examiner or by commissioners specially appointed for that purpose by commission under the great seal.¹⁴ These interrogatories are termed *original*, when exhibited on the part of the person who produces the witness; they are called *cross* interrogatories when filed on behalf of the adverse party.¹⁵ *

¹¹ The reader should consult works specially devoted to the subject of evidence; also the following acts of Congress: act of May 26th, 1790, prescribing "mode in which public acts, records and judicial proceedings, in each state, shall be authenticated, so as to take effect in every other state." Story's Laws U. S. i vol. p. 93; act of March 27th, 1804, supplementary to act of 1790. Ibid. II. vol. p. 947. And the following statute of Virginia: Code of Virginia, chap. 176, sections 1, 2, 3, 4, 5, 8, 10, 11, 14, 15, and 16.

¹² *Ante*, sec. 202. ¹³ II. Dan. Ch. Pr. 466. ¹⁴ Ibid. 474. ¹⁵ Ibid.

* It may be of some utility to the reader to be familiar with the several steps in taking testimony in the English Courts. Barton, in his History of a suit in Equity, gives the following account of the manner of taking the examination of witnesses to be used in those courts:

"In the several proceedings which we have hitherto had occasion to enumerate, as applicable to our courts of equity, the reader has perceived a great resemblance in *substance*, though generally a difference in *form*, to those used in our courts of common law. But in the examination of witnesses a material difference prevails, both in form and effect. The exami-

§ 208. In the United States Circuit Courts, the usual mode pursued is that prescribed by the sixty-seventh rule of the United States Supreme Court. That rule is as follows: "After the cause is at issue, commissions to take testimony may be taken out in vacation as well as in term, jointly by both parties, or severally by

nation in courts of law being *ore tenus*, in the presence of the judge and the court, and impromptu at the time of trial; whilst that in the courts of equity, agreeably to the civil law, is conducted in *private*, and upon interrogatories or questions in writing previously framed for the purpose.

"If the witnesses reside within twenty miles of London, this examination is taken before a public officer appointed by the court for that particular purpose; but if they reside beyond that distance, a commission, or *dedimus potestatem*, is granted to four commissioners, (two nominated by each party,) authorizing them to take the depositions of the several witnesses at the respective places of their residence.

"A Commission to examine Witnesses in Chancery.

"George the Third, by the grace of God, of Great Britain, France, and Ireland, king, defender of the faith, and so forth, to Samuel Johnson, Mayat Edwards, William Mason, and Peter Warne, greeting:

"Know ye, that we, in confidence of your prudence and fidelity, have appointed you, and by these presents do give unto you, any three or two of you, full power and authority diligently to examine all witnesses whatsoever, upon certain interrogatories to be exhibited to you, as well on the part of James Willis, complainant, as on the part of Edward Willis and William Willis, defendants, or either of them; and therefore, we command you, any three or two of you, that, at certain days and places, to be appointed by you for that purpose, you do cause the said witnesses to come before you, and then and there examine each of them apart, upon the said interrogatories, on their respective corporal oaths, first taken before you, any three or two of you, upon the holy evangelists; and that you do take such their examinations, and reduce them into writing on parchment; and when you shall have so taken them, you are to send the same to us in our chancery, without delay, wheresoever it shall then be, closed up and under your seals, or the seals of three or two of you, distinctly and plainly set forth, together with the said interrogatories, and this writ: And we further command you, and every of you, that before you act in, or be present at the swearing or examining any witness or witnesses, you do severally take the oath first specified in the schedule hereunto annexed; and we do give you, any three, two, or one of you, full power and authority, jointly or severally, to administer such oath to the rest or any other of you, upon the holy evangelists; and we further com-

either party, upon interrogatories filed by the party taking out the same, in the clerk's office, ten days notice thereof being given to the adverse party to file

mand that all and every the clerk or clerks employed in taking, writing, transcribing, or ingrossing the deposition or depositions of witnesses to be examined by virtue of these presents, shall, before he or they be permitted to act as clerk or clerks as aforesaid, or be present at such examination, severally take the oath last specified in the said schedule annexed: and we also give you, or any one of you, full power and authority, jointly and severally, to administer such oath to such clerk or clerks, upon the holy evangelists.

"Witness ourself at Westminster, the — day of —, in the 36th year of our reign.

ARDEN,
WINTER.

"Indorsed, 'By order of Court.'

"Label.—To Samuel Johnson, Mayat Edwards, William Mason, and Peter Warne, Gentlemen, any three or two of them, to examine witnesses, as well on the part of James Willis, plaintiff, as on the part of Edward Willis and William Willis, defendants, returnable without delay, on fourteen days notice to the defendants.

ARDEN,
WINTER.

"Proper notice having been given to the defendants of the time and place of executing the commission, interrogatories or questions previously framed and settled are produced on each side, and separately read to the respective witnesses, and their responses or depositions taken down in writing by the commissioners. Interrogatories should be concise and to the point, not leading or directing. The following is the usual form:

"Interrogatories exhibited in Equity.

"Interrogatories to be administered to witnesses to be produced, sworn and examined in a certain cause depending in the High Court of Chancery, wherein James Willis, by John Willis, his father and next friend, is complainant, and Edward Willis and William Willis, executors of the last will and testament of Thomas Atkins, deceased, are defendants. On the part and behalf of the said complainant; that is to say,

"First Interrogatory.—Do you know the parties, complainants and defendants, in the title of these interrogatories named, or any and which of them, and how long, &c., &c. Declare the truth and your knowledge therein.

"Second Interrogatory.—Did or did not the said Thomas Atkins, in the foregoing interrogatories named, ever, and when and where, in your sight or presence, or in the presence of any and what other person or persons,

cross interrogatories before the issuing of the commission; and if no cross interrogatories are filed at the

to your knowledge, sign, seal, publish or declare, his last will and testament, in writing, or any other and what writing, as, for, or purporting to be his last will, &c. &c.? Declare, &c.

“Third Interrogatory.—Do you know of any application or applications which have been made by or on the behalf of the above named complainant, to the defendants above named, or either and which of them, for the payment of the legacy of £800, in the pleadings in this cause mentioned to have been bequeathed to or for the benefit of the said complainant, &c. If yea, set forth when, or about what time or times respectively, and by whom, by name, and to whom, and where such application or applications was or were so made, and whether the same was or were, in any and what manner, complied with or assented to, or refused and rejected, and by whom, and for any and what reasons? Declare, &c.

“Lastly.—Do you know of any other matter or thing, or have you heard or can you say, any thing touching the matters in question in this cause, that may tend to the benefit and advantage of the complainant in this cause, besides what you have been interrogated unto? If yea, declare the same fully and at large, as if you had been particularly interrogated thereto.

A. MANNING.

“After the oaths have been duly administered to the commissioners, their clerks, and the respective witnesses, the depositions are taken and transcribed in the following form:

“Depositions in Equity by Commission.”

“Depositions of witnesses, produced, sworn, and examined, on the — day of — in the thirty-sixth year of his present majesty King George the Third, and in the year of our Lord, 1795, at the house of W. Brown, known by the sign of the Bush, situated in the parish of Kelsal, in the county of Nottingham, by virtue of a commission issuing out of his majesty's High Court of Chancery, to us, Samuel Johnson, William Mason, and others, directed, for the examination of witnesses in a cause therein depending, between James Willis, by John Willis, his father and next friend, plaintiff, and Edward Willis and William Willis, defendants, on the part and behalf of the said complainant, we, the acting commissioners, under the said commission, and also the respective clerks, by us employed, in taking, writing, transcribing, and engrossing, the said depositions, having first duly taken the oaths annexed to the said commission, according to the tenor and effect thereof, and as thereby required.

“James Henry Nevil, of Pelligate, in the county of Northampton, Esq., aged thirty years, or thereabouts, a witness produced, sworn and examined

expiration of the time, the commission may issue *ex parte*. In all cases the commissioner or commissioners shall be named by the Court or by a Judge thereof."

on the part and behalf of the said complainant, James Willis, deposeth and saith, as follows :

"To the first interrogatory—This deponent saith, that he knows the said complainant, James Willis, and hath so known him for the space of three years, last past, or thereabouts, and doth also know and is well acquainted with the said defendants, Edward Willis and William Willis, &c.

"To the second interrogatory—This deponent saith, that he was present, and did see Thomas Atkins, in the pleadings in this cause mentioned, sign, seal, publish, and declare, as and for his last will and testament, a certain writing. &c., &c.

"To the third interrogatory—This deponent saith, that in or about the month of January last, he, this deponent, was, together with John Willis, the father of the said complainant, James Willis, at the house of, and in company with, the said William Willis, and doth well remember that the said John Willis did then and there address the said defendant, on the part and in behalf of the said complainant, and requested that the said William Willis, or his co-executor, the said Edward Willis, would pay or otherwise secure, for the benefit of the said complainant, the said legacy of £800, &c. &c.

"And to the last interrogatory—This deponent saith, he doth not know of any other matter or thing, &c. &c.

JAMES HENRY NEVIL,
SAMUEL JOHNSON,
WILLIAM MASON.

"If the witness be examined, in town, before the examiner, the form will necessarily vary. :

"Depositions in Equity before an Examiner.

"Witnesses examined in a cause depending and at issue in this honorable court, wherein James Willis, an infant, by John Willis, his father and next friend, is complainant; and Edward Willis and William Willis are defendants, on the part and behalf of the said complainant, by Alexander Morgan, Esq., examiner in chancery.

"James Henry Nevil, of, &c., aged thirty years and upwards, being produced as a witness, on the part and behalf of the complainant in this cause, was, on the — day of —, in the year of our Lord 1795, shewn in person, at the seat of Mr. Hill, (who is the clerk in court of the defendants, in the title hereof named,) by Mr. Vaughn, one of the sworn clerks in my office, who then also left a note of the name, title, and place of abode of the deponent, at the seat aforesaid; and afterwards, on the

§ 209. The rule just cited further prescribes, that if the "parties shall so agree, the testimony may be taken upon oral interrogatories by the parties or their agents, without filing any written interrogatories;" and this is sometimes done.

§ 210. Testimony may also be taken in the United States Circuit Courts, after the cause is at issue, according to the provisions of the acts of Congress. There were two modes of taking depositions under the act of Congress of 1789, usually termed the "Judiciary Act." By the first, which relates exclusively to depositions *de bene esse*, notice in certain cases is not necessary and a commission is not required; by the second, a commission, or *dedimus potestatem*, is required, and depositions taken thereunder are not, under any circumstances, to be considered as taken *de bene esse*.†

same day and year, the said deponent being sworn and examined, deposeth and saith as follows :

"1st. ——— To the first interrogatories ——— the said deponent saith, that, &c. (as before.)

A. MORGAN,
R. HIND.

"The depositions being completed, are closely bound up, and (being secured from inspection by the signature and seals of the several commissioners,) sent to the court out of which the commission issued, by a messenger, who makes oath "that the said depositions have not been opened or altered since they were delivered to his charge." They are then committed to the custody of the clerk, in court, who prepared the commission, if taken in the county, or detained by the examiner, if taken in town, till publication has passed by rule or order of court. After which they may be inspected, or copies of them delivered, at the request of any of the parties.

"After publication has passed, the parties regularly are to proceed to a hearing."

† See *Buddicum v. Kirk*, 3 Cranch 293; *Sergeant's lessee v. Biddle et als*, 4 Wheat. 508.

§ 211. The first of these modes is thus prescribed by the thirtieth section of the judiciary act: "When the testimony of any person shall be necessary in any civil cause depending in any district, in any Court of the United States, who shall live at a greater distance from the place of trial than one hundred miles, or is bound on a voyage to sea, or is about to go out of the United States, or out of such district, and to a greater distance from the place of trial than as aforesaid, before the time of trial, or is ancient, or very infirm, the deposition of such person may be taken, *de bene esse*, before any justice or judge of any of the courts of the United States, or before any chancellor, justice or judge of a supreme or superior court, mayor, or chief magistrate of a city, or judge of a county court or court of common pleas of any of the United States, not being of counsel or attorney to either of the parties, or interested in the event of the cause, provided that a notification from the magistrate before whom the deposition is to be taken to the adverse party, to be present at the taking of the same, and to put interrogatories, if he think fit, be first made out and served on the adverse party, or his attorney, as either may be nearest, if either is within one hundred miles of the place of such caption, allowing time for their attendance after notified, not less than at the rate of one day, Sundays exclusive, for every twenty miles travel."¹⁶ And every

¹⁶ If no notice is given to the adverse party of the time and place of taking the deposition, agreeably to the provisions of this statute, the rules of United States Supreme Court prescribe that upon motion and affidavit of the fact the adverse party shall be entitled to a cross-examination of the witness, either under a commission or by a new deposition taken under the acts of Congress, if a court or a judge thereof shall, under all the circumstances, deem it reasonable. See LXVIII. Rule Supreme Court U.S.

person deposing as aforesaid, shall be carefully examined and cautioned, and sworn or affirmed to testify the whole truth, and shall subscribe the testimony by him or her given, after the same shall be reduced to writing, which shall be done only by the magistrate taking the deposition, or by the deponent in his presence. And the depositions so taken shall be retained by such magistrate, until he deliver the same with his own hand into the court for which they are taken, or shall, together with a certificate of the reasons as aforesaid, of their being taken, and of the notice, if any given, to the adverse party, be by him, the said magistrate, sealed up and directed to such court, and remain under his seal until opened in court. And any person may be compelled to appear and depose as aforesaid, in the same manner as to appear and testify in court.¹⁷

§ 212. As a proviso to the section of the judiciary act just cited, the following language is appended: "Provided, that nothing herein shall be construed to prevent any court of the United States from granting a *dedimus potestatem*, to take depositions according to common usage, when it may be necessary to prevent a failure or delay of justice; which power they shall severally possess; nor to extend to depositions taken in *perpetuam rei memoriam*, which, if they relate to matters that may be cognizable in any court of the

¹⁷ To admit or use depositions, on the trial of any cause, taken in the manner thus prescribed, it must appear that at the time of such trial the witnesses are dead, or gone out of the United States, or at a greater distance from the place of trial than one hundred miles; or, that by reason of age, sickness, bodily infirmity, or imprisonment, they are unable to travel and appear at court. Story's Laws, U. S., vol. 1, p. 64.

United States, a circuit court, on application thereto made as a court of equity, may, according to the usages in chancery, direct to be taken.”¹⁸

The plain intent of this proviso was, to recognize as still existent and in force in the United States Courts the powers here spoken of.

§ 213. By the act of Congress of April 29th, 1802, sec. 25, it was further enacted, “that, in all suits in equity, it shall be in the discretion of the court, upon the request of either party, to order the testimony of the witnesses therein to be taken by depositions; which depositions shall be taken in conformity to the regulations prescribed by law for the courts of the highest original jurisdiction in equity, in cases of a similar nature, in that State in which the court of the United States may be holden: Provided, however, that nothing herein contained shall extend to the circuit courts which may be holden in those States in which testimony in chancery is not taken by deposition.”¹⁹

§ 214. And by the act of February 20th, 1812, sec. 3, it was enacted, “that in any cause before a court of the United States, it shall be lawful for such court, in its discretion, to admit in evidence any deposition taken in *perpetuam rei memoriam*, which would be so admissible in a court of the State wherein such cause is pending according to the laws thereof.”²⁰

§ 215. The 67th rule of the Supreme Court U. S. prescribes that “after the cause is at issue, commissions to take testimony may be taken out in vacation as well

¹⁸ Story's Laws, U. S. vol. 1, p. 65.

¹⁹ Story's Laws, U. S. 861.

²⁰ Ibid. 1215.

as in term, jointly by both parties or severally by either party, upon interrogatories filed by the party, taking out the same, in the clerk's office, ten days' notice thereof being given to the adverse party to file cross-interrogatories before the issuing of the commission; and if no cross-interrogatories are filed at the expiration of the time, the commission may issue *ex parte*. In all cases the commissioner or commissioners shall be named by the court or by a judge thereof. If the parties shall so agree, the testimony may be taken upon oral interrogatories by the parties or their agents, without filing any written interrogatories."

§ 216. Three months and no more are allowed for the taking of testimony after the cause is at issue, unless the court or a judge thereof shall, upon special cause shown by either party, enlarge the time; and no testimony taken after such period will be allowed to be read in evidence at the hearing. Immediately upon the return of the commissions and depositions, containing the testimony, into the clerk's office, publication thereof may be ordered in the clerk's office by any judge of the court, upon due notice to the parties, or it may be enlarged, as he may deem reasonable under all circumstances. But by consent of the parties, publication of the testimony may at any time pass in the clerk's office, such consent being in writing, and a copy thereof entered in the order book, or endorsed upon the deposition or testimony.²¹

§ 217. It will be noticed that in previous sections, provision is alone made for the taking of testimony after the cause is at issue, unless we are to construe the

²¹ LXIX. Rule Supreme Court U. S.

act of Congress cited in section 211 as applying to equity causes, and intended to provide for the taking of depositions before as well as after issue. Sometimes, to compel a party to defer taking his testimony until the parties are fully at issue, would be to deprive him of it altogether; before issue, the witnesses might die or depart the country; and accordingly to remedy this defect the seventieth rule of the United States Supreme Court prescribes that "after any bill filed, and before the defendant hath answered the same, upon affidavit made that any of the plaintiff's witnesses are aged or infirm, or going out of the country, or that any of them is a single witness to a material fact, the clerk of the court shall, as of course, upon the application of the plaintiff, issue a commission to such commissioner or commissioners as a judge of the court may direct, to take the examination of such witness or witnesses *de bene esse*, upon giving due notice to the adverse party of the time and place of taking his testimony." *

§ 218. The manner of taking testimony in equity causes in the Virginia State Courts is much simpler than that usually adopted in United States Circuit Courts. In the Virginia State Courts, in equity causes, evidence is uniformly taken by way of depositions; the witnesses are examined orally, and their testimony is reduced to writing.

§ 219. A commission or *dedimus potestatem* is not necessary in equity causes in the Virginia State Courts, save when the witness resides or is out of the State at

* The same rule prevails in the English practice. II Dan. Ch. Pr. 541.

the time the deposition is taken;²² when witness resides or is in the State when examined, whether a party to the suit or not,* the deposition may be taken without a commission.²³

§ 220. The depositions may be taken before the parties are at issue;† but reasonable notice should be given to the adverse party of the time and place of taking every deposition.²⁴

§ 221. So, too, a deposition in the Virginia State Courts may be read, if returned at any time before the hearing of the cause, or though after an interlocutory decree, if it be as to a matter not thereby adjudged, and be returned before a final decree.²⁵ Even after a final decree or order in a cause, from or to which an appeal or *superaedeas* has been or might be allowed, a deposition may be taken for any party to such cause, or for or against his or her husband, personal representative, heirs or devisees, and the deposition may be read in any future trial that may be directed, if the same could properly be read had there been no such decree or order.²⁶

²² Code of Va. chap. 176, sec. 29. An affidavit that a witness resides or is out of the state is *prima facie* evidence of the fact, though the affidavit be made by a party and without notice. Ibid. sec. 27.

* When a deposition appears to be of a party, all exceptions may be made to the reading of it which could have been made if it were taken under a special commission; and the taking of such deposition shall not deprive the party taking it of any relief he would otherwise be entitled to against the deponent. See Code of Va. chap. 176, sec. 28.

²³ Ibid. sec. 28.

† This is the practice, and the words of the present statute, providing that "in any pending case" depositions may be taken, clearly sanction this course. See Code of Virginia, chap. 176, sec. 28.

²⁴ Code of Va. chap. 176, sec. 30.

²⁵ Ibid.

²⁶ Ibid. sec. 33.

§ 222. Justices, notaries public and commissioners in chancery are authorized to take depositions of witnesses who reside on or are in the State.²⁷ Such officers may administer all necessary oaths, and are simply required to certify under their hand the taking of the depositions.²⁸

§ 223. Should witnesses reside or be out of the State when examined, a commission may be issued by the clerk of the Court wherein the case is pending, directed, if the depositions are to be taken out of the State but in the United States, to a commissioner appointed by the governor of Virginia, or to any justice or notary public of the State wherein the witnesses may be; and, if the depositions are to be taken in a foreign country, the commission should be directed to such commissioner or commissioners as may be agreed upon by the parties or appointed by the Court, or, if there be none such, to any American minister plenipotentiary, charge d'affaires, consul general, vice consul, or commercial agent appointed by the government of the United States, or to the mayor or other chief magistrate of any city, town or corporation in such country, or any notary public therein. Any person or persons to whom a commission is so directed may administer an oath to the witness, and take and certify the deposition with his official seal annexed; and if he have none, then the genuineness of his signature shall be authenticated by some officer of the same state or country, under his official seal, unless the deposition is taken by a justice out of this State but in the United States; in which case his certificate will be received without any seal annexed, or other authentication of his signature.²⁹

²⁷ Code of Virginia, chap. 176, sec. 28.

²⁸ Ibid.

²⁹ Ibid. sec. 29.

How witnesses summoned and compelled to attend, production of documents, &c.

§ 224. *United States Courts.*—By act of Congress of 24th January, 1827, regulating practice in United States Circuit Courts in this regard, it is provided, that

(1). 'Whenever a commission shall be issued by any court of the United States, for taking the testimony of a witness at any place within the United States, or the territories thereof, it shall be lawful for the clerk of any Court of the United States, for the district or territory within which such place may be, and he is hereby enjoined and required, upon the application of either of the parties in the proceeding; in which such commission shall have been issued, as his agent, to issue subpoena for such witness, residing or being within the said district or territory, as shall be named in the said commission, commanding such witness to appear and testify before the commissioner or commissioners, in such commission named, at a time and place in the subpoena to be stated; and if any witness, after being duly served with such subpoena, shall refuse or neglect to appear, or, after appearing, shall refuse to testify, (not being privileged from giving testimony,) such refusal or neglect being proved to the satisfaction of any judge of the court, whose clerk shall have issued such subpoena, he may thereupon proceed to enforce obedience to the process, or to punish the disobedience, in like manner as any court of the United States may do in case of disobedience to process of *subpoena ad testificandum*, issued by such court; and the witness, in such cases, shall be allowed the same compensation as is allowed to witnesses attending the courts of the United States:

Provided, that no witness shall be required to attend at any place out of the county in which he may reside, nor more than forty miles from his place of residence, to give his or her deposition, under this law.

(2.) 'Whenever either of the parties shall apply to any judge of a court of the United States, in the district or territory of the United States in which the place for taking such testimony may be, for a *subpoena duces tecum*, commanding the witness therein to be named to appear and testify before the said commissioner or commissioners, at the time and place in the said subpoena to be stated, and also to bring or carry with him, and produce to such commissioner or commissioners, any paper, writing, or written instrument, or book, or other documents, supposed to be in the possession or power of such witness, such judge being satisfied, by the affidavit of the person applying, or otherwise, that there is reason to believe that such paper, writing, written instrument, book, or other document, is in the possession or power of the witness, and that the same, if produced, would be competent and material evidence for the party applying therefor, may order the clerk of the court, of which he is a judge, to issue such *subpoena duces tecum* accordingly, and, if such witness, after being duly served with such *subpoena duces tecum*, shall fail to produce any such paper, writing, written instrument, book, or other document, being in the possession or power of such witness, and described in such *subpoena duces tecum*, before, and to such commissioner or commissioners, at the time and place in such subpoena stated, such failure being proved to the satisfaction of the said judge, he may proceed to enforce obedience to the said process of *subpoena duces tecum*, or to punish the dis-

obedience in like manner as any court of the United States may do in case of disobedience to a like process, issued by such court; and when any such paper, writing, written instrument, book, or other document, shall be produced to such commissioner or commissioners, he or they shall, at the cost of the party requiring the same, cause to be made a fair and correct copy thereof, or of so much thereof as shall be required by either of the parties: Provided, that no witness shall be deemed guilty of contempt for disobeying any subpoena directed to him by virtue of this act, unless his fees for going to, returning from, and one day's attendance at the place of examination, shall be paid or tendered to him at the time of the service of the subpoena.' ²⁰

§ 225. *Virginia State Courts.*—The Code of Virginia, chapter 176, sec. 20, prescribes, that “a summons may be issued, directed as other process, commanding the officer to summon any person to attend on the day and at the place that such attendance is desired, to give evidence before a court, arbitrators, umpire, justice, notary public, or any commissioner appointed by a court. The summons may be issued, if the attendance be desired at a court, by the clerk thereof, and in the other cases by any person before whom, or a clerk of a court of a county or corporation in which, the attendance is desired, or if it be desired before a justice, by such or any other justice; it shall express on whose behalf, and in what case, or about what matter, the witness is to attend. This section shall be deemed to authorize a summons to compel attendance before com-

²⁰ Act 24th Jan. 1827. Story's Laws, U. S. vol. III. p. 2040.

missioners or other persons appointed by authority of another state; but only in case they be citizens of this state, and the summons requires the attendance of the witness at a place not out of his county."

§ 226. The 21st. section of the same chapter of the Code of Virginia provides, that "When it appears by affidavit that a writing or document in the possession of a person not a party to the matter in controversy is material and proper to be produced before a court, or any person appointed by it or acting under its process or authority, such court or a judge thereof in vacation, may order the clerk of said court to issue a *subpoena duces tecum* to compel such production at a time and place to be specified in the order."

§ 227. The 22d section of the same chapter provides, that "If any person, after being served with such summons fail to attend to give evidence, or to produce such writing or document, according to the summons, the court whose clerk issued the summons, or if it was not issued by a clerk, a court of the county or corporation in which the attendance is desired, on a special report thereof by the person or persons before whom there was the failure to attend, on proof that there was paid to him, (if it was required,) a reasonable time before he was required to attend, the allowance for one day's attendance, and his mileage and tolls, shall, after service of a notice to or rule upon him to shew cause against it, (if no sufficient cause be shewn against it,) fine him not exceeding twenty dollars, to the use of the party for whom he was summoned, and may proceed by attachment to compel him to attend and give his evidence, at such time and place as it may deem fit. The witness shall, moreover, be liable to any party grieved, for damages."

§ 228. And by the 23d section of the same chapter it is provided, that "If a person, after being served with such summons, shall attend, and yet refuse to be sworn, or to give evidence, or to produce any writing or document required, he may, by order of the court whose clerk issued said summons, or of the person before whom he was summoned to attend, be committed to jail, there to remain until he shall, in custody of the jailor, give such evidence or produce such writing or document."

DEMURRER TO INTERROGATORIES.

§ 229. English works on practice in Equity speak of a demurrer to interrogatories, which is simply a tender of reasons by the witness why he should not answer the questions propounded to him.³¹

SUPPRESSING DEPOSITIONS.

§ 230. In the English Courts, after the depositions are published, the solicitors examine them, and if there are any objections to their being read, the Court is asked to suppress them. The usual grounds are, that the interrogatories are leading, or the interrogatories and depositions scandalous. Other irregularities may be noted in this manner.

§ 231. In the United States Circuit Courts, and the Virginia State Courts, objections are taken to the reading of depositions, for the reasons mentioned in the last section, or for other informalities. These are termed "exceptions," and may be made before or after the

³¹ See II. Dan. Ch. Pr. 554.

depositions are returned. It is always better to except to irrelevant or improper questions, as soon as put, as well as to any answers which may be given.

[*Quære.* Is a tender of reasons by a witness, or, as it is called in English works, a demurrer to interrogatories, necessary in this country, when the witness objects to the questions propounded to him? Will not his simple objection to answer the question, without stating his reasons for so doing, serve every purpose accomplished by a demurrer to interrogatories?]

RE-EXAMINATION OF WITNESSES.

§ 232. A party, after having once taken the deposition of a witness in a cause, is not at liberty to examine him a second time without special leave obtained of the Court. This practice prevails in the English Courts, in the United States Circuit Courts, and in the Virginia State Courts. The object of this rule is to prevent the tampering with witnesses or inducing them to retract or contradict or explain away in a second examination, what they have stated in the first; and while the Court will, in the exercise of a sound discretion, permit a second examination where justice seems to require it, this permission should be guarded with strict scrutiny.

§ 233. The forms necessary in taking depositions in the United States Circuit Courts, and in the Virginia State Courts, will be found in the Appendix to this volume.

CHAPTER VII.

Of the hearing and decree.

§ 234. It is the practice in England, when the cause is set down for hearing, for the plaintiff to give notice to the adverse party of the day appointed for the hearing. This is done by means of a writ called a *subpœna to hear judgment*.¹ This is not the practice, either in the Virginia State Courts or in the United States Circuit Court held in Virginia. In these Courts, all the purposes of the subpœna to hear judgment are fully accomplished by the entry of the cause upon the court docket. .

§ 235. The mode of hearing causes in equity is in nearly every respect similar to the course pursued before courts of common law. The party plaintiff, on the main hearing, or in case of a motion, the party moving, usually opens the argument, which is replied to by the opposite party, and the argument is then closed by the former. For the convenience of the Court, arguments in equity causes are usually written out, instead of being spoken; but there is no positive rule on the subject. Each Court prescribes for its own regimen the course to be pursued by counsel or parties, in this regard.

¹ II. Dan. Ch. Pr. 607.

§ 236. After the cause is heard, the Court proceeds to adjudicate the rights of the parties; and this adjudication is termed its decree or order.

§ 237. A distinction has been drawn in the books between decrees proper and interlocutory orders, the latter having reference to orders not made at the hearing of the cause, i. e., when the parties are not fully at issue before the Court,² and the former referring to such adjudications or orders as the Court may make at the hearing.

§ 238. This distinction is one more in name than in fact. While it is true, that in the case of interlocutory orders, so called, a final disposition of the cause cannot be made, it is true that when the cause comes on to be heard, and the parties are fully at issue before the Court, either one of the subjects detailed as proper for an interlocutory order may then be decreed. Without attempting, however, to disturb the long-settled practice of legal writers in this regard, the distinction between these interlocutory orders, so called, and decrees at the hearing, will be preserved in this volume, and the former will be treated of in a subsequent part of this work. To the discussion of decrees we now proceed.

§ 239. Decrees are defined by Daniell to be the sentence or order of the Court pronounced on hearing and understanding all the points in issue, and determining the right of all the parties to the suit according to equity and good conscience.³

§ 240. Decrees are either interlocutory or final. An interlocutory decree is when the consideration of the particular question to be determined, or of further di-

² *Adam's Equity*, 248.

³ *II. Dan. Ch. Pr.* 631.

rections generally, is reserved until a future hearing: a decree is final, when it fully decides and disposes of the whole merits of the case, and reserves no further questions or directions for the future judgment of the Court, so that it will not be necessary to bring the cause again before the Court for another decision.⁴ It is not absolutely necessary to the finality of a decree that it should make such a disposition of every matter in the cause, as that it may be at once removed from the docket. A decree, disposing of the whole subject, deciding all questions in controversy, ascertaining the rights of all parties and awarding the costs, though it appoint a commissioner to sell part of the subject, and account for and pay the proceeds to the parties, with liberty to them to apply to the court to add other or substitute new commissioners, or for a partition of the subject to be sold in kind, is a final decree.⁵

⁴ 11 Dan. Ch. Pr. 631. See sec. 250, *post*.

⁵ Hol. Int. to Equity, p. 310. In *Thomas v. Fitzhugh*, 4 Leigh 209, Judge Carr says, "Where any thing is reserved by the court for future adjudication in order to settle the matters in controversy, the decree is interlocutory; but where, upon the hearing, all these matters are settled by the decree, such decree is final, though much may remain to be done before it can be completely carried into execution, and though to effectuate such execution the cause is retained and leave given to the parties to apply for the future aid of the court." In *Cocks v. Gilpen*, 1 Rob. R. 20, Judge Baldwin investigated the subject very fully, and after adverting to the necessity of resorting to some criterion by which the distinction between the two kinds of decree may be preserved, remarks, "For my own part, I am aware of no proper criterion but this: Where the further action of the court in the cause" (which he contradistinguishes from the action of the court *beyond* the cause, to which he afterwards adverts,) "is necessary to give completely the relief contemplated by the Court, there the decree upon which the question arises is to be regarded, not as final, but interlocutory."

⁶ *Harvey v. Branson*, 1 Leigh 108. See other cases cited in Appendix to this volume, in which decree has been pronounced *final*, though it was necessary that the cause should be kept in court for other proceedings.

§ 241. It rarely happens that a first decree can be final or conclude the cause. Thus, if any matter of fact is strongly controverted, the Court is so sensible of the deficiency of trial by written evidence, that it will not bind the parties thereby, but will direct the matter to be tried by a jury, which is termed, in the books, directing an issue out of chancery.⁶ And so, too, in the Court of Chancery in England, if a question of law arises, that Court will direct a case to be stated, and send to a court of common law for its opinion.⁷ This last mentioned practice, however, does not prevail in this country.

§ 242. In many cases, certain preliminary inquiries are necessary before a final decree should be pronounced; and these will be ordered to be made by one of the masters of the court.⁸ As, to instance, in all cases relating to the distribution of an estate, or where

⁶ This was formerly effected in England by what was termed a *feigned issue*. As juries could not be summoned to attend the Court of Chancery, the fact was usually ordered to be tried at the bar of one of the courts of common law or at the assizes; and to do this effectually, so that the point in dispute, and that only, should be put in issue, an action was *feigned* to be brought, wherein the pretended plaintiff declares that he laid a wager of five pounds with the defendant that a particular thing was true; as, for instance, that A. was heir-at-law to B., and then avers that it is so, and brings his action for the five pounds. The defendant admits the wager, but avers that A. is not the heir-at-law to B., and thereupon that issue is joined, which is directed out of Chancery to be tried. And until this feigned issue was tried, no final decree could be pronounced in the cause. II. Dan. Ch. Pr. 681. This fiction is now dispensed with in England, and the question may be referred to the jury in a direct form. 8 & 9 Vict. ch. 109, s. 19. In the Virginia State Courts, the issue is ordered in the direct form, and may be tried either at the bar of the Court of Equity, or before a court of common law.

⁷ II. Dan. Ch. Pr. 766.

⁸ In Virginia State Courts, masters are termed "commissioners," or "master commissioners."

there is a fund distributable among persons constituting a particular class consisting of numerous individuals, or where accounts between the parties should be first settled.

§ 243. In all of these cases, and many others which might be mentioned, the Court will, before pronouncing its final decree, direct enquiries before the master or commissioner; and the order directing these enquiries is termed an interlocutory decree, or, as some writers express it, a decretal order.

§ 244. Beside the decrees mentioned in the foregoing sections, there are decrees in the English courts which are termed *decrees nisi*, or conditional decrees. These are prepared by the party seeking them, and being entered up in the absence of the defendant, (though he has been served with a subpoena to hear judgment,) and without the action of the court, the plaintiff is not entitled to have such decrees made absolute, until the defendant is served with a subpoena for that purpose, and fails to appear at the time specified therein, and shew cause against them.⁹ We have in the Virginia State Courts and in the United States Circuit Courts no proceeding like this, which the defendant may claim as a matter of right* after the cause is at issue. Before

⁹ II. Dan. Ch. Pr. 645, 650.

* There are in the Virginia State Courts instances of decrees somewhat like the decrees nisi mentioned in the text, as in the case of infant defendants, who are allowed a certain period after arriving at mature years to appear, and contest the propriety of any decree which may have been entered. See Code of Virginia, chap. 178, sec. 7. And so, too, in the Virginia State Courts, when one proceeds against absent or unknown defendants, they are permitted, subsequent to decree, to have the decree set aside for good cause shown, and to have any injustice in the proceeding corrected. See Code of Virginia, chapter 170, sec. 13;

the cause is at issue, however, in the Virginia State Courts, at the rules held by the clerk there is entered on default of the defendant's appearance a *decree nisi*, which is simply an order that if the defendant fails to appear at the next rules the bill will be taken for confessed, and the matter decreed accordingly.

§ 245. Decrees may be made in chancery causes in favor of one defendant against another defendant; but this practice appears to be limited to cases in which the plaintiff is entitled to a decree against some one of the defendants.¹⁰

FORM OF DECREES.

§ 246. English writers make the following divisions in the form of decrees: 1, the date and title; 2, the recitals; 3, the ordering part; to which may be added, 4, the declaratory part, which, when made use of, generally precedes the ordering part.

1. *Date and title.*

§ 247. The decree commences in England with a recital of the day of the month and year when it was

and, in other cases, defendants are sometimes required to do particular acts, as for instance, to pay money into court or to deliver up the possession of certain premises, unless they show cause against it by a day appointed. These last are termed "rules," and are distinguished from the "*decree nisi*," mentioned in the text, by the fact that they are the act of the court and pass under its supervision before entry.

¹⁰ See *Hubbard v. Goodwin*, 3 Leigh 522, in which Judge Tucker said, "I am clearly of opinion that the court ought not to undertake to adjust the transactions between Hubbard and Kennedy. None of the cases in which the court has decreed between defendants have gone so far. I think it has been done in no case where the plaintiff was not entitled to a decree against both or either. The practice should not be extended further."

pronounced, and of the names of the several parties to the cause.¹¹ In the United States Circuit Courts, and in the Virginia State Courts, decrees or orders are entered at large on the record book by the clerk, all the entries of one day arranged under one general heading, and the names of the parties, plaintiff and defendant, preceding each decree or order.

2. *Recitals.*

§ 248. Formerly, says Daniell, treating of practice in English Courts, decrees contained recitals of the pleadings in the cause, which were introduced by the words, "This cause coming on the — instant, and also on this present day, to be heard and debated before the Right Honorable, &c., in the presence of counsel learned on both sides, the substance of the plaintiff's bill appeared to be, &c. [then followed a recital of material parts of plaintiff's bill]; therefore, that the defendants, &c. [reciting the prayer,] and to be relieved in the scope of the plaintiff's bill; whereto the counsel for the defendants alleged that they, by their answer, &c. [then followed a recital of the defence set up by the answer]; Whereupon, &c." Many attempts have been recently made by the Judges of the Court of Chancery in England to shorten the length of decrees occasioned by the introduction of these recitals, and by the latest of the general orders which have been promulgated with that view, it is directed that in original decrees and orders made on the hearing of causes, the recitals, previous to the exhibits read, shall be the substance and scope only of the

¹¹ II. Dan. Ch. Pr. 654.

pleadings, tending to the point in controversy upon which the decree is founded, and be made in a most concise manner, and not to contain any recitals immaterial to the issue.¹²

§ 249. In the United States Circuit Courts, by the 86th rule of the United States Supreme Court, in drawing up decrees and orders, neither the bill nor answer, nor other pleadings, nor any part thereof, nor the report of any master, nor any other prior proceeding, should be recited or stated in the decree or order, but the decree or order should begin in substance as follows: "This cause came on to be heard [or, to be further heard, as the case may be,] at this term, and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged and decreed as follows, viz: [here insert the decree or order.]"

§ 250. In the Virginia State Courts, when a decree or decretal order at the hearing is first entered in a cause, it is usual in this part of the decree or order, to recite the manner in which the cause has been matured, with the statement that the cause has been argued by counsel, &c.* Thus, in case there be in the cause an answer of one defendant, with a replication, and as to another defendant the bill has been taken for confessed, exhibits and depositions being filed, the recital would be as follows: "This cause came on this day to be heard

¹² II. Dan. Ch. Pr. 664.

* The omission to state on the face of decree how cause was matured will not be error. *Quarrier v. Carter's representatives*, 4 H. & M. 242. But where the decree stated that "a cause came on to be heard upon the bill, answer and exhibits," and the answer denied the statements of the bill, the appellate court disregarded the depositions which had been filed, (no mention having been made of them in the decree,) reversed the decree, and dismissed the bill. *Shumate v. Dunbar*, 6 Munf. 430.

on the bill taken for confessed as to the defendant C. D., and on the answer of the defendant E. F., with general replication thereto by the plaintiff, exhibits and examinations of witnesses, and was argued by counsel. On consideration whereof, the Court doth adjudge, order and decree, &c."*:—when the cause has been heard before, as follows: "This cause came on this day to be again heard on the papers formerly read, and on, &c. [if new bills or answers, replications, &c., specify them,] and was argued by counsel. On consideration whereof, &c."

3. *Ordering part.*

§ 251. The ordering or mandatory part of the decree contains the specific directions of the Court upon the matter before it. These directions must, it is obvious, depend upon the nature of the particular case, which is the subject of the decree.¹³ It is usual, in the English Courts, when the decree is merely interlocutory, and directs an issue or a case at law or an inquiry to be made or account to be taken by a master, that it should contain a reservation of the further matters to be decided, and, generally, also a reservation of the question of costs of the suit, till after the event of the issue or case, or of the enquiry or account, shall be known.¹⁴ These reservations seem not to be necessary, and are not usually inserted either in decrees of the United States Circuit Courts or of the Virginia State Courts.

* See in Appendix to this volume other forms of recitals of decrees in particular cases.

¹³ II. Dan. Ch. Pr. 667.

¹⁴ II. Dan. Ch. Pr. 668. See sec. 240 ante.

4. *Declaratory part.*

§ 252. Where the suit seeks a declaration of the rights of the parties, the ordering part of the decree should be prefaced by such a declaration. This, however, is not absolutely necessary, and the omission of it will not invalidate the decree.¹⁵

§ 253. Forms of decrees and decretal orders as used in the United States Circuit Courts and in the Virginia State Courts, may be found in the Appendix to this volume.

ENTERING DECREES.

§ 254. In the English Courts, when a final decree is pronounced by the Court, the minutes of it are taken down by the registrar, and are frequently read over by him in the presence of the parties concerned or of their counsel and solicitors.¹⁶ Subsequently, the decree is drawn up by the registrar, and is passed and entered up. Till this last step is taken, the decree is only inchoate.¹⁷ But even after this proceeding, until the decree is enrolled, it does not strictly become a record of the Court, and is not considered of a sufficiently permanent nature to entitle it in other Courts to the same attention that is paid by one Court of record to the records of other Courts of the same nature.¹⁸

§ 255. The process of "enrolling" is as follows: the clerk in court draws up the form of the decree for enrolment, reciting therein all the pleadings, orders and material proceedings in the cause. These being put

¹⁵ II. Dan. Ch. Pr. 668.

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸ Ibid. 674.

into the proper form, language and order, are copied at large upon paper, and the paper upon which the enrolment is so made is called the docket.¹⁹ This docket is then signed; if the decree is pronounced by ~~the~~³ the Lord Chancellor, the Lord Chancellor alone signs it, if by the Master of the Rolls or the Vice-Chancellor that Judge first signs it, and after that the Lord Chancellor.¹⁹ The docket properly signed, the day and year of the signature are written at the foot, near the signature of the Lord Chancellor, after which the clerk in court enrolling the decree engrosses an exact copy thereof upon parchment rolls, and carefully examines them with the docket, which, together with the parchment rolls, is carried by the clerk in court into the record room of the Six Clerks' Office, and deposited with the record keeper for safe custody. The enrolment is then complete, and a decree thus enrolled is pleadable, and cannot be reversed but by appeal or by bill of review.²⁰

§ 256. In the Virginia State Courts, as well as in the United States Circuit Courts, the manner of entering of record decrees is much simpler than that just detailed as the practice in England. The clerks of these courts, being the keepers of the records, enter in order books prepared for the purpose, all decrees which the Court pronounces. These are read in the hearing of the Court, and are signed by the Judge pronouncing

¹⁹ II. Dan. Ch. Pr. 680.

²⁰ Ibid. 681. A caveat is sometimes entered against the enrolling of a decree. See the practice in this regard fully set forth in II. Dan. Ch. Pr. 682, *et seq.*

them, or, if the Court be composed of more than one judge or justice, by the presiding judge or justice.*

WHEN AND HOW DECREES MAY BE CORRECTED.

§ 257. *Virginia State Courts.*—In these Courts, though decrees be final in their character, they are within the control of the Court during the term at which they may have been pronounced or entered, and during that term they may be set aside, or altered, or amended, in such form and manner as the Court shall deem fit; but after the term has closed, the Court has no further power over decrees final in their character, and such then can only be altered on a bill of review, or by an appeal to a higher Court, unless such decrees come within the operation of the statute cited in the following section.

§ 258. The Code of Virginia has made provision for the correction of errors, in certain cases, in judgments and decrees by the Court which pronounced them, or by a Judge thereof in vacation. The terms of this statute are as follows:

(1.) "For any clerical error, or error in fact, for which a judgment or decree may be reversed or corrected on writ of error *coram nobis*, the same may be reversed or corrected, on motion after reasonable

* By chap. 161, sec. 5. Code of Virginia, "the proceedings of every court shall be entered in a book and read in open court by the clerk thereof. In a county or corporation court, the minutes of such proceedings shall be read every day the court sits, immediately before its adjournment. In every other court, the proceedings of each day shall be drawn up at large and read the next day, except those of the last day of a term, which shall be drawn up and read the same day. After being corrected where necessary, the record shall be signed by the presiding judge or justice." The latter practice prevails in the United States Circuit Courts.

notice, by the Court, or if the judgment or decree be in a Circuit Court, by the Judge thereof in vacation." ²¹

(2.) "No judgment or decree shall be stayed or reversed for the appearance of either party, being under the age of twenty-one years, by attorney, if the verdict (where there is one,) or the judgment or decree, be for him and not to his prejudice; or for want of warrant of attorney; or for the want of a *similiter*, or any mis-joining of issue; or for any informality in the entry of the judgment or decree by the clerk, or for the omission of the name of any juror, or because it may not appear that the verdict was rendered by the number of jurors required by law, or for any defect, imperfection or omission in the pleadings, which could not be regarded on demurrer, or for any other defect, imperfection or omission, which might have been taken advantage of on a demurrer or answer, but was not so taken advantage of." ²²

(8.) "No decree shall be reversed for want of a replication to the answer, where the defendant has taken depositions as if there had been a replication; nor shall a decree be reversed at the instance of a party who has taken depositions, for an informality in the proceedings, when it appears that there was a full and fair hearing upon the merits, and that substantial justice has been done." ²³

(4.) "The Court in which there is a judgment by default, or a decree on a bill taken for confessed, or the Judge of said Court in the vacation thereof, may, on motion, reverse such judgment or decree for any error

²¹ Code of Virginia, chap. 181, sec. 1.

²² Ibid. sec. 3.

²³ Ibid. sec. 4.

for which an appellate Court might reverse it, if the following section was not enacted, and give such judgment or decree as ought to be given. And the Court in which is rendered a judgment or decree in a cause wherein there is in a declaration or pleading, or in the record of the judgment or decree, any mistake, miscalculation, or misrecital of any name, sum, quantity, or time, when the same is right in any part of the record or proceedings, or when there is any verdict, report of a commissioner, bond, or other writing, whereby such judgment or decree may be safely amended; or in which a judgment is rendered on a forthcoming bond for a sum larger than by the execution or warrant of distress appears to be proper, or on a verdict in an action for more damages than are mentioned in the declaration; or in the vacation of the Court in which any such judgment or decree is rendered, the Judge thereof may, on the motion of any party, amend such judgment or decree according to the truth and justice of the case; or in any such case the party obtaining such judgment or decree may, in the same Court, at any future term, by an entry of record, or, in the vacation, by a writing signed by him, attested by the clerk and filed among the papers of the cause, release a part of the amount of his judgment or decree; and such release shall have the effect of an amendment, and make the judgment or decree operate only for what is not released. Every motion under this chapter, shall be after reasonable notice to the opposite party, his agent or attorney, in fact or at law, and shall be within five years from the date of the judgment or decree.”²⁴

²⁴ Code of Virginia, chap. 181, sec. 5.

(5.) "No appeal, writ of error, or *supersedeas*, shall be allowed by an appellate Court or Judge for any matter for which a judgment or decree is liable to be reversed or amended, on motion as aforesaid, by the Court which rendered it, or the Judge thereof, until such motion be made and overruled in whole or in part. And when an appellate Court hears a case wherein an appeal, writ of error or *supersedeas* has been allowed, if it appear that, either before or since the same was allowed, the judgment or decree has been so amended, the appellate Court shall affirm the judgment or decree, unless there be other error; and if it appear that the amendment ought to be and has not been made, the appellate Court may make such amendment, and affirm in like manner the judgment or decree, unless there be other error." ²⁵

§ 259. *United States Circuit Courts.*—Clerical mistakes in decrees or decretal orders, or errors arising from any accidental slip or omission, may, in the United States Circuit Courts, at any time before an actual enrolment thereof, be corrected by order of the Court or a Judge thereof, upon petition, without the form or expense of a re-hearing. ²⁶

§ 260. All decrees in the Courts of the United States are deemed to be enrolled at the term in which they were passed. ²⁷ After the expiration of the term at which they are enrolled, these decrees, if final, are to stand without alteration or amendment, and if an appeal thereon lies to the Supreme Court, may only be set aside or amended upon proceeding by a bill of

²⁵ Code of Virginia, chap. 181, sec. 6.

²⁶ LXXXV. Rule Supreme Court U. S.

²⁷ See *Dexter v. Arnold*, 5 Mason's C. C. R.

review or by an appeal. In causes in which no appeal lies from such decrees, a petition for a re-hearing may, in the discretion of the Court, be admitted at any time before the end of the next term of the Court succeeding such enrolment. This petition should contain the special matter or cause on which such re-hearing is applied for, should be signed by counsel, and the facts therein stated, if not apparent on the record, should be verified by the oath of the party or by some other person.²⁸

WHEN RE-HEARING MAY BE HAD.

§ 261. Infant defendants in the Virginia State Courts are permitted to show cause against any decree, within six months after attaining the age of twenty-one years;²⁹ and in these Courts, when a decree or order is made in a cause, in which there is an unknown party or other defendant who has not been served with process and did not appear in the case before such decree or order, the unknown party or other defendant, or the representative of any such, may, within five years from the date of the decree or order, if he be not served with a copy of such decree or order more than a year before the end of said five years, and if so served, then within one year from the time of such service, petition to have the cause re-heard, and may plead or answer, and have any injustice in the proceedings arrested.³⁰ As we have seen, in section 260, there are certain cases in which decrees in the Circuit Courts of the United States may be corrected on petition for a re-hearing.

²⁸ See LXXXVIII. Rule Supreme Court U. S.

²⁹ Code of Virginia, chap. 173, sec. 7. ³⁰ *Ibid.* chap. 170, sec. 12.

CHAPTER VIII.

UNITED STATES CIRCUIT COURTS.

§ 262. In previous chapters, the practice of these Courts has been treated of, but further sections should be devoted to the more particular consideration of this subject.

§ 263. The rules are held in these Courts on the first Monday in every month, when the clerk is required to be in attendance at his office for the purpose of receiving, entering, entertaining, and disposing of all motions, orders, and other proceedings, which are grantable of course, and applied for or had by the parties or their solicitors in all causes pending in Equity.¹

§ 264. Bills, answers and other pleadings may be filed at any time, whether at rules or otherwise; the Circuit Courts, as Courts of Equity, being deemed always open for this purpose, and for the purpose of issuing and returning mesne and final process and commissions, and for making and directing all interlocutory motions, orders, rules, and other proceedings, preparatory to the hearing of all causes upon their merits.²

§ 265. As was stated in the 92d section, the filing of the bill is uniformly the first step taken in Equity

¹ II. Rule Supreme Court U. S.

² I. Rule Supreme Court U. S.

causes in these Courts.³ Upon the filing of the bill, the clerk issues a *subpoena*, commanding the defendants therein named, by a day specified, to appear and answer the bill. This process should be made returnable to the next rule day, or the next rule day but one, at the election of the plaintiff, occurring after twenty days from the time of the issue thereof.⁴

§ 266. This subpoena, as well as other process issuing from these Courts, is served by the United States Marshal or his deputy, or by some other person specially appointed by the Court for that purpose, and not otherwise; when served by a person specially appointed for the purpose, an affidavit of the service is necessary.⁵

§ 267. Subpoenas may be sued out separately for each defendant, save in the case of husband and wife, defendants; or a joint subpoena may be sued out against all the defendants.⁶

§ 268. At the bottom of the subpoena should be placed a memorandum that the defendant is to enter his appearance in the suit in the clerk's office, on or before the day at which the writ is returnable; otherwise, the bill may be taken *pro confesso*.⁶

§ 269. Subpoenas are served by a delivery of a copy thereof by the officer serving the same to the defendant personally, or in case of husband and wife, to the husband personally, or by leaving a copy thereof at the dwelling house or usual place of abode of each defen-

³ XI. Rule Supreme Court U. S.

⁴ XII. Rule Supreme Court U. S.

⁵ XV. Rule Supreme Court U. S.

⁶ XII. Rule Supreme Court U. S.

dant, with some free white person who is a member or resident in the family.⁷

§ 270. Upon the return of the subpoena as served and executed upon any defendant, the clerk will enter the suit upon his docket as pending in the Court, and will state the time of the entry.⁸

§ 271. If the defendant has been served with the subpoena twenty days before the rule day to which it was made returnable, he should enter his appearance on the return day; if the subpoena has not been served on him twenty days before that time, his appearance should be entered at the next rule day succeeding the rule day when the process is returnable.⁹ He may appear either personally or by his solicitors, and his appearance will be noted by the clerk in his order book.¹⁰

§ 272. Unless the time be enlarged for good cause shown, by a Judge of the Court, upon motion for the purpose, the defendant will be required to file his plea, demurrer, or answer to the bill, in the clerk's office, on the rule day next succeeding that of entering his appearance; in default whereof the plaintiff may, at his election, enter an order (as of course) in the order book, that the bill be taken *pro confesso*; or the plaintiff, if he requires any discovery or answer to enable him to obtain a proper decree, will be entitled to process of attachment against the defendant to compel an answer.¹¹

⁷ XIII. Rule Supreme Court U. S. See *ante*, note 3 to sec. 3.

⁸ XVI. Rule Supreme Court U. S.

⁹ XVII. Rule Supreme Court U. S.

¹⁰ *Ibid*.

¹¹ XVIII. Rule Supreme Court U. S. See *ante* sec. 82, of act, on "Process of Contempt."

§ 273. When the bill is taken for confessed, the cause will be proceeded in *ex parte*, and the matter of the bill may be decreed by the Court at its next term, if the same can be done without an answer and is proper to be decreed;¹² and after decree upon bill taken for confessed, such decree will be deemed absolute unless the Court shall at the same term set it aside or enlarge the time for filing the answer upon cause shown upon motion and affidavit of the defendant.¹³

§ 274. If the process of attachment be resorted to to compel an answer of the defendant, and he be arrested thereunder, he will not be discharged unless upon filing his answer or otherwise complying with such order as the Court or a Judge thereof may direct, as to pleading to or fully answering the bill, within a period to be fixed by the Court or Judge, and undertaking to speed the cause;¹⁴ in other cases when his appearance has not been compelled by process of attachment, he may either plead, demur to, or answer the bill at rules.

§ 275. Guardians *ad litem* to defend a suit may be appointed by the Court or a Judge thereof, for infants or other persons who are under guardianship, or otherwise incapable to sue for themselves; all infants and other persons so incapable may sue by their guardians, if any, or by their *procchein ami*, subject, however, to such orders as the court may direct for the protection of infants and other persons.¹⁵

¹² XVIII. Rule Supreme Court U. S. ¹³ XIX. Rule. This motion will not be granted, unless upon the payment of the costs of the plaintiff in the suit up to that time, or such part thereof as the Court shall deem reasonable, and unless the defendant shall undertake to file his answer within such time as the Court may direct, and submit to such other terms as the Court may direct, for the purpose of speeding the cause.

¹⁴ XVIII. Rule Supreme Court U. S.

¹⁵ LXXXVII. Rule.

§ 276. A demurrer or plea is not allowed to be filed, unless upon a certificate of counsel that in his opinion, it is well founded in point of law, and supported by the affidavit of the defendant¹⁶ that it is not interposed for delay; and, if a plea, that it is true in point of fact.¹⁷ See preceding fourth chapter as to other matters concerning pleas and demurrers in these Courts, and Appendix.

§ 277. Answers are put in under oath or affirmation.¹⁸ A defendant was formerly not bound to answer any statement or charge in the bill unless specially and particularly interrogated thereto, nor to answer any interrogatory in the bill except such as he was specially required to answer; and where a defendant answered any statement or charge in the bill, to which he was not interrogated, only by stating his ignorance of the matter so stated or charged, his answer was deemed impertinent;¹⁹ but by a subsequent rule of the Supreme Court of the United States these provisions were repealed and it is not now necessary to interrogate a defendant specially and particularly upon any statement in the bill unless the complainant desires to do so to obtain a discovery.²⁰

§ 278. A defendant is at liberty, by answer, to decline answering any interrogatory or part of an interrogatory, from answering which he might have protected himself by demurrer; and he will be at liberty so to decline, notwithstanding he answers other parts of the bill from which he might have protected himself by demurrer.²¹ See preceding fourth chapter as to other matters concerning answers, and Appendix.

¹⁶ XXXI. Rule Supreme Court U. S.

¹⁷ Ibid.

¹⁸ See sec. 153 *ante*, also XXXIX. and XCI. Rules Supreme Court U. S.

¹⁹ XL. Rule.

²⁰ XCII. Rule.

²¹ XLIV. Rule.

§ 279. As to replication to answers, see 183, 184, sections, *ante*, also 56th rule of United States Supreme Court, found in Appendix.

§ 280. As to exceptions to answers, see 186, 187, 188, 189, 190, 191, sections, *ante*, also, 61st, 62d, 63d, 64th and 65th rules of the United States Supreme Court, printed in the Appendix to this volume.

§ 281. As to testimony in these Courts, see preceding sixth chapter, also Rules of United States Supreme Court, printed in Appendix. If depositions be taken in the mode prescribed by the 67th rule of the United States Supreme Court, the concluding interrogatory should be as follows: "Do you know, or can you set forth, any other matter or thing, which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that is material to the subject of this your examination, or the matters in question in this cause? If yea, set forth the same fully and at large in your answer." See LXXI. Rule of United States Supreme Court.

§ 282. See preceding seventh chapter on hearing and decree; also Rules of United States Supreme Court, printed in Appendix. And see next Book for proceedings in these Courts subsequent to decree.

SUIT IN EQUITY.

BOOK II.

CHAPTER I.

APPEALS.

§ 283. If a rehearing of a final decree may not be had, as we have seen, after the expiration of the term at which it was entered, the decree must stand without alteration or amendment, unless set aside or amended upon proceeding by a bill of review or by an appeal. Of bills of review we shall treat in a subsequent chapter; this chapter will be devoted to the consideration of appeals.

Appellate Jurisdiction.

§ 284. UNITED STATES COURTS.—Appellate jurisdiction in the Federal Courts, when final decrees have been rendered by the United States Circuit Courts, is vested in the United States Supreme Court. That court may entertain jurisdiction in the appellate form in all cases arising under the constitution, laws and treaties of the Union. In suits in equity, where the matter in dispute, exclusive of costs, exceeds the sum

of two thousand dollars, appeals may be taken to that court from all final decrees rendered by the United States Circuit Courts.¹ So, in all causes affecting patents or copyrights appeals are given to the Supreme Court of the United States from decisions in the Circuit Court.² An appeal also lies to the Supreme Court of the United States from a final decree of the highest Court of Equity of a State in which a decision in the suit could be had, when in such suit is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is *against* their validity; or when, in such suit, is drawn in question the validity of a statute of, or an authority exercised under, any State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision is *in favor* of such their validity; or when, in such suit, is drawn in question the construction of any clause of the Constitution, or of a treaty or statute of, or commission held under, the United States, and the decision is *against* the title, right, privilege or exemption, specially set up or claimed by either party, under such clause of the said constitution, treaty, statute, or commission.³

§.285. VIRGINIA STATE COURTS.—Appellate jurisdiction is exercised in Virginia by the Supreme Court of Appeals, by Special Courts of Appeals, by the District Courts, by the Circuit Courts, and by the County or

¹ Acts of Congress, 1803, chap. 93, sec. 2; Story's Laws U. S., vol. II. p. 905.

² Acts of 1819, chap. 143; Story's Laws U. S., vol. III. p. 1719.

³ Acts of 1789, chap. 20, sec. 25; Story's Laws U. S., vol. I. p. 51.

Corporation Courts. Of the last named, it is unnecessary to say more than this:—they entertain appeals from all decisions of single magistrates; and from decisions which they pronounce on such appeals there is no appeal to a higher tribunal.⁴

§ 286. *Supreme Court of Appeals.*—By the 11th section of the sixth article of the Constitution of Virginia it is declared that this Court “shall have appellate jurisdiction only, except in cases of habeas corpus, mandamus, and prohibition. It shall not have jurisdiction in civil causes where the matter in controversy, exclusive of costs, is less in value or amount than five hundred dollars, except in controversies concerning the title or boundaries of land, the probat of a will, the appointment or qualification of a personal representative, guardian, committee or curator; or concerning a mill, road, way, ferry or landing, or the right of a corporation or of a county to levy tolls or taxes; and except in cases of habeas corpus, mandamus, and prohibition, and cases involving freedom or the constitutionality of a law.”

By the 8th section of chapter 61, Session Acts of 1852, “Every appeal, writ of error or supersedeas allowed to or from a judgment, decree or order of a Circuit Court in a controversy concerning the right of a corporation or of a county to levy tolls or taxes, or in a case involving freedom or the constitutionality of a law, shall be docketed in the Supreme Court of Appeals.”

⁴Code of Virginia, chap. 182, sec. 3. Session Acts, 1852, chap. 61, section 5.

By the 9th section of same chapter, "When there is a petition for an appeal, writ of error or supersedeas to or from a judgment, decree or order of a Circuit Court in a case of mandamus, prohibition or habeas corpus, or in a controversy concerning the title or boundaries of land, or concerning the probat of a will, or concerning a mill, road, way, ferry or landing, or concerning the appointment or qualification of a personal representative, guardian, committee or curator, or in any civil cause where the matter in controversy, exclusive of costs, is not less in value or amount than five hundred dollars, and not embraced by the sixth and eighth sections of this act, the counsel or attorney to certify as to the propriety of reviewing the decision, may be counsel or attorney either of the Supreme Court of Appeals or a District Court, and the petition may be presented to a Judge of a District Court, or to the Supreme Court of Appeals, or a Judge thereof."

By the 10th section of same chapter, "If on a petition in any case mentioned in the preceding section, the appeal, writ of error or supersedeas be allowed by the Supreme Court of Appeals in term, the same shall be docketed in said Court. And if on a petition in any such case, the appeal, writ of error or supersedeas be allowed by a Judge of said Court or of a District Court, the same shall be docketed also in the Supreme Court of Appeals, unless the appellant or plaintiff in error ask it to be docketed in a District Court, in which case it may, by order of said Judge, be docketed in the District Court for the district constituted in part of the circuit wherein the judgment, decree or order was made or rendered. But any case docketed under this section in a District Court shall, on the application

of an appellee or defendant in error to such Court or a Judge thereof, be transferred by order of such Court or Judge to the Supreme Court of Appeals, provided such application be made within ninety days after the summons on the appeal, writ of error or supersedeas is returned executed on such appellee or defendant in error, and provided the application be also made before the appeal, writ of error or supersedeas is heard in the District Court."

By the 11th section of the same chapter, "By consent of the parties or their counsel, a pending cause may be transferred from a District Court to another District Court, or from the Supreme Court of Appeals to a District Court, or from a District Court to the said Supreme Court, except that there shall not be transferred to the said Supreme Court any cause of which it cannot have jurisdiction consistently with the eleventh section of the sixth article of the Constitution."

By the 13th section of same chapter, "Every appeal, writ of error or supersedeas allowed to or from a judgment, decree or order of a District Court, shall be docketed in the Supreme Court of Appeals." But it is provided by the next preceding section, that "No appeal, writ of error or supersedeas shall be allowed to or from a judgment, decree or order of a District Court unless such judgment, decree or order be in a case of habeas corpus, mandamus or prohibition, wherein said Court has exercised original jurisdiction."

§ 287. *Special Court of Appeals.*—This Court is formed for the purpose of trying cases remaining on the docket of the Court of Appeals when the judges ceased to hold their offices under the late Constitution, and to try cases in respect to which a majority of the

Judges of the Supreme Court may be so situated as to make it improper for them to sit on the hearing thereof. See 17th chapter of Session Acts of 1853-4, for provisions of statute concerning this Court.

§ 288. *District Courts.*—These courts exercise appellate jurisdiction alone, save in the cases of *habeas corpus*, *mandamus* and *prohibition*, when they have original jurisdiction also.

By the 6th section of chapter 61, Session Acts, 1852, "When an appeal, writ of error or supersedeas is hereafter allowed to or from a judgment, decree or order of a Circuit Court in a civil cause, of which the Supreme Court of Appeals is prohibited from having jurisdiction by the eleventh section of the sixth article of the Constitution, such appeal, writ of error or supersedeas shall be docketed in the District Court for the district constituted in part of the circuit wherein the judgment, decree or order was made or rendered." See 286th section *ante*.

§ 289. *Circuit Courts.*—These courts exercise appellate jurisdiction, when there is an appeal from a judgment, decree or order of a County or Corporation Court, in a cause in which the Circuit Court might have exercised original jurisdiction, and when it is not to a judgment of a County or Corporation Court which is rendered on an appeal from a judgment of a justice.⁵

§ 290. These several Virginia State Courts exercise appellate jurisdiction as follows: from decrees or orders pronounced by the County or Corporation Courts, appeals should be taken to the Circuit Courts, and from decrees or orders pronounced by the Circuit Courts

⁵ See Sess. Acts, 1852, chap. 61, sec. 5, and Code of Va., chap. 182, sec. 3.

appeals may be taken either to the Supreme Court of Appeals or to the District Courts; save in cases in which these courts respectively have not jurisdiction, when such appeals must be taken to that court having jurisdiction in the case, (see section 286, *ante*;) from decrees or orders by the District Courts, when pronounced in a case of *habeas corpus*, *mandamus* or *prohibition*, an appeal lies to the Supreme Court of Appeals, in other cases an appeal cannot be taken.⁶

How appeal obtained, and proceedings on appeals.

§ 291. UNITED STATES COURTS.—From *final* decrees pronounced by the United States Circuit Courts, an appeal may be taken as of right to the Supreme Court of the United States in the cases in which that Court may entertain appellate jurisdiction;⁷ the Circuit Courts, however, prescribe the penalty of the bond which the party appealing is to execute.* Five years is the limit prescribed by Act of Congress in which appeals may be taken from decrees pronounced by these courts, with a reservation of the like period to infants, *femes covert*, persons *non compos mentis* or imprisoned, after their disability has been removed.⁸ It is deemed unnecessary here to speak farther of the practice on appeals from decrees of the United States Circuit Courts.

§ 292. VIRGINIA STATE COURTS.—In these Courts, save in special cases provided by statute, (see Code of Virginia, chap. 182, sec. 1,) appeals may not be taken as a matter of right from decrees or orders; and, on

⁶ *Sess. Acts*, 1862, chap. 61, sec. 12.

⁷ See 284 section, *ante*.

⁸ *Acts of Congress*, 1789, chap. 20, sec. 22.

* This bond is conditioned for the payment of all loss and damage which any party may sustain by reason of the appeal.

the other hand, the right of appeal is not restricted to final decrees, as in the United States Courts.

§ 293. To procure an appeal in ordinary cases, a party must present his petition to the appellate court or a judge thereof, with the transcript of the record, or so much thereof as may be necessary to enable the court or judge to determine the matter properly, and in order that he may not meanwhile be injured or put to inconvenience by the attempt of the opposite party to enforce the decree or order, before the transcript has been prepared and the petition is presented, the Virginia statute has provided, that "if a party desire to present a petition for an appeal, at his instance, the court in which the decree or order is, during the term at which it is rendered or made, or if it be in a Circuit Court, any circuit judge may, within sixty days after such term is ended, make an order suspending the execution of such decree or order, (for a reasonable time to be specified in such order);" the party, however, making this motion, will be required to give bond before the clerk of said court in such penalty as the court or judge may require, with a condition reciting such decree or order, and his intention to present such petition, and providing for the payment of all such damages as any person may sustain by reason of the said suspension, in case a supersedeas to such decree or order should not be allowed, and be effectual within the time specified.⁹

⁹ See Code of Virginia, chap. 182, sec. 4. By Sess. Acts, 1852, chap. 62, sec. 1. "In a case in which it is lawful to present a petition for an appeal from a writ of error or supersedeas to a judgment, decree or order of a District Court, the said Court, or a Judge of a District Court, may make such suspending order as a Circuit Court or Judge might make if the judgment, decree or order were in a Circuit Court."

§ 294. *When petition may be presented.*—A party to any suit in equity, wherein there is a decree or order dissolving an injunction or requiring money to be paid, or the possession or title of property to be changed, or adjudicating the principles of the cause, or a party to any case wherein there is a final decree or order, may present a petition for an appeal from the decree or order,¹⁰ save in these cases: 1, where it is an appeal from a judgment of a County or Corporation Court, rendered on an appeal from a judgment of a justice; 2, when the appeal is from a decree or order of a court other than a County or Corporation Court, and the matter in controversy is less in value and amount than one* hundred dollars, exclusive of costs, and there be not drawn in question a freehold or franchise, or the title or bounds of land, or some matter not merely pecuniary; and, 3, when the appeal is from a final decree or order (whether the commonwealth be a party or not) which has been rendered more than five years before the petition is presented.¹¹

§ 295. *Matter and form of petition.*—The petition should set forth the errors or grievances complained of in the decree or order from which the appeal is taken. The statute requires that it shall be accompanied by a transcript of the record of so much of the case wherein the decree or order is, as will enable the court or judge to whom the petition is to be presented properly to decide on the petition, and enable the court, if the

¹⁰ Code of Virginia, chap. 182, sec. 2.

* See Code of Virginia, chap. 182, sec. 5, and Sess. Acts, 1852, chap. 61, sec. 5.

¹¹ See *ibid.*

petition be granted, properly to decide the questions that may arise before it;¹² and it is further provided by statute that the petition shall not be presented until some counsel or attorney of the appellate court shall certify that in his opinion it is proper that the decision should be reviewed by such court.¹³

§ 296. The petition usually contains a brief synopsis of the facts of the case, and points out the supposed errors or grievances in the decree or order of the court. The following is the form of a petition presented to the Court of Appeals:

To the Honorable the Judges of the Court of Appeals.

The petition of W. N. humbly sheweth, that in a suit in Chancery, pending in the Circuit Court for the county of W., in which the executors of T. R. deceased, are plaintiffs, and your petitioner, with others, are defendants, two interlocutory decrees have been pronounced, the first on the 15th of April, 18—, affirming the plaintiff's title to recover of your petitioner a large sum of money and directing an account of the amount; the second on the 14th of October, 18—, affirming the plaintiff's title to recover of your petitioner the sum of \$8096 63, with interest on part thereof, and appointing commissioners to sell for the payment thereof a certain tract of land in the proceedings mentioned; as will more fully appear by reference to the transcript of the record herewith submitted.

The following is the outline of the case in which these decrees have been rendered:

In the year 18—, a few months after your petitioner had attained his full age, (he being twenty-one years old on the 4th December, 18—,) and immediately after he had returned from college, when he was entirely in-

¹² See Code of Virginia, chap. 132, sec. 5.

¹³ Ibid. sec. 8.

experienced in the business affairs of the world, he was induced by the said T. R. to enter into a contract with him for the purchase of a tract of between 800 and 900 acres of land in the county of W., called Cabin Point, at the price of \$15 per acre, amounting in the whole to the sum of \$13,046 53, to be paid for in the following manner, viz: \$2,500 part thereof to be paid in cash in the course of a short time, to meet debts due from the said R., and the balance of the purchase money, viz: \$10,546 53 to be paid shortly after the said T. R. should be married, if that event should ever happen, and in the meantime during the life of the said T. R., or until he should be married, your petitioner was to pay him an annuity equal to the interest upon the balance of the purchase money, viz: an annuity of \$632 79. R. accordingly executed a deed to your petitioner for the land, bearing date the 29th October, 18—, which is the defendant's exhibit "A," p. 67 of the record; and on the 11th November, 18—, your petitioner executed a deed of trust conveying the land to W. F. T. and R. M., to secure the payment of the aforesaid annuity of \$632 79, and of the balance of the purchase money aforesaid, which seems to be set down by mistake in that deed as \$10,556 53, instead of \$10,546 53; a copy of which deed is exhibited with the plaintiff's bill, and is found at p. 3 of the record. Before the date of this deed your petitioner had made the cash payment of \$2,500 to meet the debts of the said R.

The nominal price of \$13,046 53 was at least double the fair value of the land in the market, which would have been dearly purchased at the price of \$7,000, or at the price of \$2,500, which your petitioner paid in cash, and the annuity of \$632 79, which he bound himself, if he had not bound himself to pay any thing further upon the marriage of the said R.; for the land was not worth more than \$7,000 at the utmost, and was not worth more than an annual rent of \$250. For the value of the land, see the depositions of Dr. R. M., p. 46, and J. J., p. 50.

Your petitioner, in his inexperience, was induced to enter into the contract, such as it is, by the artifice and fraud of the said T. R. At the time of this contract the said R. was an old bachelor of the age of about 50 years. He was in good health, having the prospect of a long life before him; was of a proud and aristocratic disposition, much addicted to literature; was a distant relative of your petitioner, had lived in the family of your petitioner's father, professed much attachment to his children and a disposition to make them heirs of whatever property he might leave; said he had been disappointed in love, that the only woman in the world that he would consent to marry had discarded him, and that he never intended to marry, though he did not wish to hold out to the world the idea that he did not so intend to marry. In the course of the negotiation for this property, which your petitioner was reluctant to purchase, and for which he certainly would not have agreed to give the price of upwards of \$13,000, the said R. over and over again pressed upon him the advantageous character of the purchase, for which he said your petitioner would have to pay no more than the \$2,500 advanced and the annuity, assured your petitioner that he never meant to marry, and that the provision for further payment in case of marriage was merely intended to save appearances, *was worth nothing, was a mere nullity*; and by these declarations, in which your petitioner was so credulous as to confide, he was ultimately induced to agree to the contract as aforesaid. For these facts, your petitioner refers to the first deposition of Dr. M., p. 46, his second deposition, p. 73, and the deposition of J. T., p. 71.

But that these declarations of R. that he never intended to marry were fraudulently made, is rendered probable by the reputed courtships of the said R. shortly after the contract aforesaid; as proved by the first deposition of Dr. M. and the deposition of J. T.

He, however, lived unmarried for many years after the contract, and continued to receive his annuities, and more than the whole amount of his annuities, up to

the year 18—. Before that time he had become extremely infirm in health and a pauper, supported at the expense of the overseers of the poor; having exhausted all the annuities which had fallen due to him from your petitioner and become considerably indebted to him beyond. He had lost all hope of ever being able to induce any decent woman to marry him, and had resolved to marry any one, even the most abandoned, in order to compel your petitioner to pay him the money which by the contract had been made payable in the event of his lawful marriage. To prove that he intended to marry, not for the sake of the marriage, but for the sake of getting money from your petitioner, see the deposition of B. J., p. 54-5, and the deposition of the plaintiff's witness, W. Y. S., p. 39, to whom T. R. declared that for this purpose *marry he would, at all events; even a negro.*

He had become very wretched, and while he lived at W. Courthouse, had attempted suicide. He was then removed to be boarded in a private family, where he had a severe attack of apoplexy, which terminated in great debility, perhaps paralysis. He was then removed to board at the house of the aforesaid B. J., where, in the month of June, in the year 18—, he had a second fit, which terminated in a complete paralysis of one side of the body, affecting his speech very much and leaving him utterly impotent of body and very seriously affected in his mind. It was in this state of things that he declared to the said J. his determination to marry any discreet girl, however poor she was, in order that he might get his money.

This determination seems to have become known in the neighborhood, and shortly afterwards a poor girl, named E. C., came to the house where he was, desired to be presented to him, and offered herself to him in marriage. When she asked him if he still wished to marry any one, he answered, "Oh no—he was too far gone—there were none that would have him at that time." She assured him that she would marry him; and so the interview terminated, without any other acceptance or rejection of the proposition. See Mrs.

M. J.'s deposition, p. 59. On the next day her friends came to him, obtained from him some authority to issue the marriage license, which was obtained accordingly on a bond executed by one W. H. H., acting as attorney in fact for R., and by the same H. as the surety in the bond, bearing date the 21st August, 1838, p. 46. The day afterwards the young woman came, and in the presence of several persons, R. being held up by the assistance of two men, the marriage ceremony was performed.

There is some little variance in the testimony of the witnesses concerning the circumstances of this ceremony and the condition of R. R. W. Y., a witness for the plaintiffs, p. 44, gives a favorable account of the state of R.'s mind, thinking that he was in his senses and distinctly made the proper responses to the minister during the ceremony. The other witnesses present give an account of the deplorable condition of R. at the time of the ceremony, of his mistaking another young woman present for the one he was about to marry, of his listlessness and apparent stupor on the occasion, his making no responses to the minister, and the great debility of his body.

In addition to the testimony of B. J. and his wife Margaret before referred to, pp. 53 and 59, see the depositions of B. P. A., p. 57, C. C. M., p. 58, S. J., p. 62.

At the time of this marriage, if R. was in a state of mind which enabled him to give a valid assent to any contract, which cannot be admitted, he was unquestionably in a state of corporal impotency which permanently disabled him from consummating the marriage. As to his impotency, his incapacity for coition, see the plaintiffs' witnesses, W. Y. S., p. 37, and Dr. P., p. 41, and defendant's witnesses, B. J., p. 53, C. C. M., p. 58, W. H., p. 62, Dr. W., p. 66.

As to the character of the woman E. C., whom R. married, there seems to be some little difference of opinion, some of the witnesses having heard nothing unfavorable of her; but that she was infamous seems sufficiently proved by the testimony of N. G., p. 52, and R. R. H., same page.

The day after the marriage, R. executed a power of

attorney to H., who had acted as his agent in procuring the marriage license, giving him authority to collect whatever money was due to him from your petitioner and others. See the power, p. 65.

He then immediately removed from J.'s, and died on the 3d March, 1839, having in the meantime made his will, appointing the plaintiffs his executors, giving them his whole estate, except one small legacy, and taking no notice of his wife. See the will, p. 34.

W. F. T., one of the trustees in the deed aforesaid, having died, and R. M., the surviving trustee, believing that the contract was fraudulent and nothing was due under it, having refused to act in carrying the deed into effect, R.'s executors brought this suit in August, 1840, claiming a balance of the annuities which they alleged were unpaid, alleging that a lawful marriage had taken place between R. and E. C., asking that the contract should be enforced and the lands sold accordingly. To this bill they made defendants, your petitioner, Dr. M., the surviving trustee, and the heirs of the deceased trustee, p. 1.

Your petitioner answered the bill, denying that any thing remained due on account of the annuities, alleging that they had been considerably overpaid, insisting upon the fraud in the original contract and the fraud in the attempted marriage, and its utter nullity, both on account of the fraud and on account of the imbecility of R. in body and mind. (p. 6.)

The surviving trustee, Dr. M., answered, assigning as his reason for refusing to carry into effect the deed of trust, that he was satisfied that nothing was due under it, and that your petitioner had been defrauded by R. (p. 35.)

The answer of the infant heirs of W. F. T. is at p. 37.

In April, 18—, this cause was brought to hearing, and the first interlocutory decree above mentioned was pronounced, affirming the plaintiff's right to recover, and directing an account. (p. 68.)

Under this order the commissioner made a report, which, not being excepted to, has not been copied into this record. It appears, however, that the annuities

had been overpaid, as the sum reported due was less than that by which the contract would have fallen due upon the marriage of R.

In October, 18—, your petitioner was allowed to file his petition for a re-hearing, which was accordingly filed. (p. 69.)

The deposition of J. T., and the second deposition of Dr. M., were taken upon that petition.

In October, 18—, the cause was brought on for further hearing, when the petition for re-hearing was overruled, the second statement in the commissioner's report, with a slight correction, was confirmed, and a decree rendered against your petitioner for \$8,096 63, with interest on \$7,526 12 from the 22d August, 18—, to be paid forthwith, in failure whereof the land in the deed of trust mentioned was directed to be sold for cash by commissioners appointed by the court. (p. 74.)

Your petitioner is advised that this decree is erroneous,—

First, because the original contract was fraudulent.

Secondly, because the alleged marriage, even if made under circumstances which would have rendered it valid between the parties, was a fraud upon the contract aforesaid, and could give no valid claim against your petitioner.

Thirdly, because that marriage itself was void in law by reason of the mental imbecility and the corporal impotency of R.; or at the least, it was not such a lawful marriage as was contemplated by the contract. He therefore prays an appeal from the decrees aforesaid, that a supersedeas may be awarded thereto, that they may be reversed and annulled, and such other decree rendered as may be proper.

W. N., *by his Counsel.*

We are humbly of opinion, that it is proper that the decrees above referred to should be reviewed by the Court of Appeals.

C. & G. N. J.,
Counsel practising in the Court of Appeals.

§297. When the petition is for an appeal from a decree or order of a County or Corporation Court, it may be presented to any Circuit Judge or to the Circuit Court where the case is to be docketed if the appeal be allowed.¹⁴ In appeals from decrees or orders of Circuit Courts, the petition should be presented to the Supreme Court of Appeals, if such decrees or orders be pronounced in a controversy concerning the right of a corporation or of a county to levy tolls or taxes, or in a case involving freedom or the constitutionality of a law;¹⁵ in appeals from decrees or orders pronounced in causes over which the Supreme Court of Appeals has not appellate jurisdiction, as mentioned in 286th section, *ante*, the petition should be presented first to a Judge of a District Court, and if rejected by him may be presented to the District Court wherein the case would be docketed if the petition be allowed, or to a Judge of the Supreme Court of Appeals;¹⁶ but from decrees or orders of Circuit Courts, if rendered in a case of mandamus, prohibition or habeas corpus, or in a controversy concerning the title or boundaries of land, or concerning the probat of a will, or concerning a mill, road, way, ferry or landing, or concerning the appointment or qualification of a personal representative, guardian, committee or curator, or in any civil case where the matter in controversy, exclusive of costs, is not less in value or amount than five hundred dollars, and not embraced among those specially assigned to the District Courts or Court of Appeals as afore-mentioned, the petition may be presented either to a Judge

¹⁴ Code of Virginia, chap. 182, sec. 12; also, sec. 9.

¹⁵ Sess. Acts, 1852, chap. 61, sec. 8.

¹⁶ *Ibid.* sec. 7.

of a District Court, or to the Supreme Court of Appeals, or a Judge thereof.¹⁷

§ 298. *When petition rejected, when allowed.*—The petition will be rejected when it is for an appeal from an interlocutory decree or order, in a case which the Court or Judge to whom it is presented deems it most proper should be proceeded in farther in the court below;¹⁸ in a case wherein the court or judge to whom a petition is duly presented shall deem the decree or order plainly right and reject it on this ground, if the order of rejection so state, and the rejection be by the court in term, no other petition shall afterwards be presented to the same purpose, except that when the rejection is by a Circuit Court, or a Judge of the District Court,¹⁹ the petition (or a copy thereof,) and the order of rejection, with the transcript of the record, may be presented to the District Court, wherein the case would be docketed if the petition be allowed, or to a Judge of the Supreme Court of Appeals.²⁰

§ 299. *When appeal allowed.*—The Court or Judge to whom a petition is duly presented, if of opinion that the decision complained of ought to be reviewed, may allow an appeal, and may award a supersedeas to stay proceedings, either in whole or in part.²¹

§ 300. *Where appeal docketed.*—Appeals from decisions of the County or Corporation Courts should be docketed in the Circuit Courts of such county or corpo-

¹⁷ Ibid. sec. 9.

¹⁸ Code of Virginia, chap. 182, sec. 10.

¹⁹ Sess. Acts, 1852, chap. 61, sec. 7.

²⁰ Ibid. Code of Virginia, chap. 182, sec. 10.

²¹ Code of Virginia, chap. 182, sec. 11.

ration;²² appeals from decisions of the Circuit Courts, in cases in which Courts of Appeals have not jurisdiction, should be docketed in the District Courts, and appeals from Circuit Courts, in cases in which District Courts have not jurisdiction, should be docketed in the Court of Appeals; and on appeal from the decisions of the Circuit Courts, in cases in which both the District Courts and the Court of Appeals entertain jurisdiction, will be docketed in the Court of Appeals, unless the appellant ask that it be docketed in a District Court, when, by order of the Judge awarding the appeal, it will be docketed in the District Court for the District, constituted in part of the circuit wherein the decree or order was made or rendered.²³ Appeals from decisions of District Courts are, in the cases in which such appeals are allowed, docketed in the Court of Appeals.

§ 301. An appeal docketed in a District Court, if in a case in which a Court of Appeals would entertain jurisdiction, may, on application to the District Court or a Judge thereof by the appellee, be transferred by order of such Court or Judge to the Supreme Court of Appeals: provided the application be made within ninety days after the summons on the appeal or the supersedeas is returned executed on such appellee, and provided the application be also made before the appeal is heard in the District Court.²⁴

§ 302. By consent of the parties or their counsel, a pending cause may be transferred from one District Court to another District Court, or from the Supreme

²² Code of Virginia, chap. 182, sec. 12.

²³ See sections 9, 10, chap. 61, Sess. Acts, 1852.

²⁴ Sess Acts, 1852, chap. 61, sec. 10.

Court of Appeals to a District Court, or from a District Court to the said Supreme Court, except it be a cause over which the Supreme Court of Appeals cannot exercise jurisdiction consistently with the eleventh section of the sixth article of the Constitution.²⁵

§ 303. *Bond of appellants.*—Save where an appeal, writ of error or supersedeas is proper to protect the estate of a decedent, convict or insane person, the same will not take effect until bond is given by the appellants or petitioners, or one of them, or some other person, in a penalty to be fixed by the court or judge by or in which the appeal, writ of error or supersedeas is allowed or entered, with condition, if a supersedeas be awarded, to perform and satisfy the judgment, decree or order, or the part thereof proceedings on which are stayed, in case the said judgment, decree or order, or such part, be affirmed, or the appeal, writ of error, or supersedeas be dismissed; and also to pay all damages, costs and fees, which may be awarded against or incurred by the appellants or petitioners, and if it be an appeal from an order or decree dissolving an injunction or dismissing a bill of injunction, with a further condition to indemnify and save harmless the surety in the injunction bond against all loss or damage in consequence of his suretyship; and with condition, when no supersedeas is awarded, to pay such specific damages and such costs and fees, as may be so awarded or incurred.”²⁶ When the appeal is allowed on petition, this bond is taken by the clerk of the appellate court before process is issued thereupon, except where the

²⁵ Sess. Acts, 1852, chap. 61, sec. 11.

²⁶ Code of Virginia, chap. 182, sec. 12.

Court of Appeals, or the District Court,²⁷ is the appellate court, in which event the clerk of that court will endorse on the summons or supersedeas that it is not to be effectual until such bond be given before the clerk of the court below, who shall take the bond and endorse on the same process that it has been given, and the names of the sureties therein.²⁸

§ 304. *Dismissal of appeal.*—Process will not issue on an appeal or supersedeas allowed to or from a final decree or order, if, when the record is delivered to the clerk of the appellate Court, there have elapsed five years since the date of the final decree or order; but the appeal or supersedeas will be dismissed whenever it appears that five years have elapsed since the said date before the record is delivered to such clerk, or before such bond is given as is required to be given before the appeal or supersedeas takes effect;²⁹ and after the dismissal of an appeal or supersedeas, no other appeal or supersedeas will be allowed to or from the same decree or order.³⁰

§ 305. *Printing of records.*—The records on appeals to the District Courts and the Supreme Court of Appeals are required to be printed. See Sess. Acts, 1852, chap. 62, sec. 3 and 4.

§ 306. *Proceedings in appellate court.*—Parol testimony will not be heard on an appeal or supersedeas in the District Courts or in the Court of Appeals;³¹ but

²⁷ Sess. Acts, 1852, chap. 62, sec. 2.

²⁸ Code of Virginia, chap. 182, sec. 14.

²⁹ Ibid. sec. 17. *Yarbrough and wife v. Deakase*, 7 Gratt. 374.

³⁰ Code of Virginia, chap. 182, sec. 18.

³¹ Code of Virginia, chap. 182, sec. 22. Sess. Acts, 1852, chap. 62, sec. 5.

on appeals from the order of a County or Corporation Court, in special cases, witnesses may be examined in the Circuit Courts.³²

§ 307. In case of death, marriage of a female, or lunacy, or conviction of felony of party to an appeal, if such party be an appellee, the appeal may be revived by scire facias, as in other cases;³³ if he be an appellant, on motion, without notice, the appeal may be proceeded in in the name of the proper parties, as in other cases.³⁴ And, without such scire facias or motion, if in any case of appeal, writ of error or supersedeas, which is now or may hereafter be pending, there be at any time in an appellate court, suggested or relied on in abatement, the death of a party, or any other fact, which, if it had occurred after verdict in an action, would not have prevented judgment being entered, (as if it had not occurred,) the appellate court may, in its discretion, enter judgment or decree in such case as if the said fact had not have occurred.³⁵

§ 308. The appellate court will affirm the decree or order, if there be no error therein, and reverse the same, in whole or in part, if erroneous, and enter such decree or order as the court whose error is sought to be corrected ought to have entered; affirming in those cases where the voices on both sides are equal.³⁶

§ 309. When a decree is reversed or affirmed by the Supreme Court of Appeals, the reasons therefor should

³² See Code of Virginia, chap. 182, sec. 22.

³³ See 88, 89 sections, *ante*; also Code of Virginia, chap. 173, sec. 3.

³⁴ See 88, 89 sections, *ante*; also Code of Virginia, chap. 173, sec. 3.

³⁵ Sess. Acts, 1853-4, chap. 18, sec. 1.

³⁶ Code of Virginia, chap. 182, sec. 23.

be stated in writing, and preserved with the record of the case.³⁷

§ 310. When any decree or order is affirmed, damages will be awarded to the appellee. Such damages, when the decree or order is for the payment of money, will be at the rate of six per centum per annum on the whole amount of the recovery (including interest and costs) from the time the appeal or supersedeas took effect until the affirmance, or if the affirmance be by the Court of Appeals, or by a District Court,³⁸ until a copy of its decision is entered in the order book of the court below; which damages, the statute declares, shall be in satisfaction of all interest during that time.³⁹ When the decree or order is not for the payment of any money except costs, the damages will be such specific sum as the appellate court may deem reasonable, not being more than one hundred dollars, nor, in the Court of Appeals, less than thirty dollars.³⁹

§ 311. When any decree or order of a County or Corporation Court is reversed or affirmed, the cause will not be remanded to said court for further proceedings, but will be retained in the Circuit Court, and there proceeded in, unless by consent of the parties, or for good cause shown, the appellate court direct otherwise;⁴⁰ in the case of other decrees or orders, the cause will be remanded to the court whose decision is appealed from.

³⁷ Constitution of Virginia, Article VI. sec. 13.

³⁸ Sess. Acts, 1852, chap. 62, sec. 7.

³⁹ Code of Virginia, chap. 182, sec. 24.

⁴⁰ Code of Virginia, chap. 182, sec. 25.

§ 312. *Decisions of Court of Appeals and of District Courts, how transmitted.*—When any term of the Court of Appeals or of a District Court is ended, or sooner, if the Court so direct, the clerk thereof shall certify, and by mail or otherwise transmit its decisions to the clerk of the court below, except that it shall not be his duty to certify or transmit a copy of a decree of affirmance, unless the appellee shall have paid all fees due from him in the case, or shall endorse on such copy so much of the decree for the benefit of the clerk as the unpaid fees amount to.⁴¹

§ 313. *Decision of appellate court entered in court below.*—The court from which any case may have come to a District Court or to the Court of Appeals, shall enter the decision of the appellate court as its own, and execution may issue thereon accordingly. If such decision be received by the clerk of the court below in vacation he will enter it of record in his order book, and thereupon such execution may issue and such proceedings be had in the case, as would have been proper if the decision had been entered in court.⁴²

⁴¹ See Code of Virginia, chap. 182, sec. 26; also Sess. Acts, 1852, chap. 62, sec. 8. See also Code of Virginia, chap. 182, sec. 27.

⁴² Sess. Acts, 1852, chap. 62, sec. 9. Code of Virginia, chap. 182, sec. 28.

CHAPTER II.

EXECUTION OF DECREE.

§ 314. If the party against whom a decree is rendered does not appeal, or procure a re-hearing, or file a bill of review for the purpose of altering or amending or reversing the decree, the opposite party proceeds to enforce the same by the process of the court.

§ 315. Till a late period, a party, to compel obedience to decrees and orders of the Court of Chancery in England, was forced to resort to the process of contempt.¹ On the 10th May, 1839, however, orders were promulgated by that court, providing that forms of writs of *perì facias*, *elegit* and *venditioni exponas*, similar to those adopted by courts of law, might be used for the purpose of enforcing any pecuniary demand to which a party might be declared entitled by a decree;² in other cases, the process of contempt is the only remedy.³

§ 316. In the United States Circuit Courts, as in the Virginia State Courts, decrees or orders in equity for the payment of money, are enforced in the same way

¹ II. Dan. Ch. Pr. 698. See 83 and 84 sections, *ante*.

² II. Dan. Ch. Pr. 699.

³ *Ibid*, 700.

as judgments at common law;⁴ other decrees or orders may be enforced by the process of contempt or its equivalent, and in special cases, mentioned in section 319, *post*, the party may proceed by writ of assistance.

§ 317. In the United States Circuit Courts, if the decree be for the performance of any specific act, as, for example, for the execution of a conveyance of land, or the delivering up of deeds, or other documents, it is required by the eighth rule of the United States Supreme Court, that the decree shall, in all such cases, prescribe the time within which the act shall be done, of which the defendant will be bound, without further service, to take notice; and upon affidavit of the plaintiff, filed in the clerk's office, that the decree has not been complied with within the prescribed time, the clerk will issue a writ of attachment against the delinquent party, from which, if attached thereon, he shall not be discharged, unless upon a full compliance with the decree and the payment of all costs, or upon a special order of the court or of a judge thereof, upon motion and affidavit, enlarging the time for the performance thereof; and if the delinquent party cannot be found, a writ of sequestration will issue against his estate, upon the return of *non est inventus*, to compel obedience to the decree.

§ 318. In the Virginia State Courts, in the cases mentioned in last section, the ordinary course pursued is this: the party is in the first instance served with a copy of the decree or order requiring him to do the specific act by a day which is usually mentioned in the

⁴ See VIII. Rule Supreme Court U. S.; also Code of Virginia, chap. 177, sec. 16, 17, 18, 20, 21; also chap. 186, 187, 188, *passim*.

decree or order; if he fail to comply, a rule is then made upon him to show cause why an attachment should not issue against him for his contempt in not obeying the decree or order of the court; and a copy of this is likewise served upon him; if he fail to appear to this rule an attachment will be issued against him; if he appear and show no sufficient cause, he will be in some cases imprisoned or fined, beside being required, before his release, to comply with the former order or decree of the court. In case an attachment issues, and it is not served upon him, the process of contempt may be regularly pursued to the sequestration.⁵

Writ of assistance.

§ 319. The writ of assistance is a process to put a party in possession of an estate which has been ordered by a decree or order to be delivered.⁶ Under the old practice of the Court of Chancery in England, this writ could not be obtained without previously suing out and serving what was termed a "writ of injunction" to deliver possession, which could only be procured upon the issuing of an attachment or other process of contempt against the parties for not obeying the writ of execution, which attachment or process was not, however, required to be executed;⁷ subsequently, the writ of injunction was omitted, and by special statute⁸ it was provided that where any party obstinately retains possession of land or other real property, after a writ of

⁵ See Code of Virginia, chap. 186, sec. 1.

⁶ II. Dan. Ch. Pr. 723.

⁷ Ibid. 724.

⁸ 1 Wm. 4, chap. 36, sec. 15.

execution of a decree, or an order for delivery of possession has been duly served, and demand of possession made, and upon an affidavit of such service of the writ of execution, and of such demand made thereunder, and a refusal to comply therewith on the part of the person against whom the writ issued, the party issuing it shall be at liberty to obtain the usual order of course for the writ of assistance to issue, and that the intermediate writs of attachment and injunction, further commanding the party to deliver possession, on any other writ, shall be unnecessary.⁹

§ 320. This writ is rarely, if ever, used in the Virginia State Courts. The usual course adopted in these courts in cases in which, according to the practice just mentioned, this writ might issue, is the one recited in section 318, *ante*.

§ 321. In the United States Circuit Courts, when any decree or order is for the delivery of possession, upon proof made by affidavit of a demand and refusal to obey the decree or order, the party prosecuting the same will be entitled to a writ of assistance from the clerk of the court.¹⁰

§ 322. The forms of several writs of execution of decrees to enforce decrees or orders for the payment of money, are similar to those at common law. Forms of these writs, and of the writ of assistance will be found in the Appendix to this volume.

§ 323. In the United States Circuit Courts every person, not being a party in any cause, who has ob-

⁹ II. Dan. Ch. Pr. 724.

¹⁰ IX. Rule Supreme Court U. S.

tained an order, or in whose favor an order has been made, will be enabled to enforce obedience to such order by the same process as if he were a party to the cause; and every person, not being a party in any cause, against whom obedience to any order of the court may be enforced, will be liable to the same process for enforcing obedience to such order, as if he were a party to the cause.¹¹

¹¹ X. Rule Supreme Court U. S.

CHAPTER III.

Proceedings under Interlocutory Decrees or Orders.

§ 324. In this chapter we propose to treat of proceedings under interlocutory decrees or orders of more frequent occurrence in equity causes.

1. *Issues out of Chancery, &c.*

§ 325. It was stated in a previous section, that in certain cases a Court of Equity will direct matters of fact which arise in a cause to be tried by a jury.¹ This is termed in the books, "directing an issue out of Chancery."²

§ 326. The mode of procedure in issues out of Chancery in the English Courts has already been spoken of,² and we have seen that such issues are, in England, invariably directed to be tried before courts of common law. This is the practice in the Circuit Courts of the United States, these courts sitting as courts of common law when such issues are tried. The Virginia State Courts, however, sitting as Courts of Equity, may direct such issues to be tried at their own bar, or at the bar of a common law court.³

¹ See section 241, *ante*.

² See note 6 to sec. 241, *ante*.

³ Code of Virginia, chap. 177, sec. 4. A Circuit Court will not be compelled to try an issue ordered by a County or Corporation Court. *Ibid*.

§ 327. Feigned issues are not directed in any case; these have been abolished in England, and do not prevail in this country.

§ 328. The course of proceeding upon the trial of an issue is generally the same as that adopted in ordinary trials at law, except where the court directing the issue has given any special directions upon the subject.⁴

§ 329. After the trial has been had, the court before whom it is tried certifies to the court directing the issue how the verdict was found; and if any special circumstances occur at the trial which the court may think it right to report, they may be certified to the court directing the issue.⁵

§ 330. On the trial of an issue, a bill of exceptions for an alleged misdirection of the judge will not lie; the regular course is, to apply to the court directing the issue for a new trial;⁶ but, in *Stanard v. Graves, &c.*, 2 Call, 369, where the court in which issue was tried, refused to certify its opinion of the verdict, it was held by the Virginia Court of Appeals that if a party apply for such certificate, and the court refuse it,

⁴ II. Dan. Ch. Pr. 742. The Court of Chancery usually provides, that on the trial of the issue, copies of the bill, answers, exhibits and depositions of such of the witnesses as are dead or cannot attend shall be read in evidence. ROANE, J., in *Burwell, &c. v. Corbin, &c.*, 1 Rand. 154. See II. Dan. Ch. Pr. 744. And it will impose such restrictions upon the parties as will prevent all fraud or surprise on the trial. 2 Paige, 484. See 1 H. & M. 72.

⁵ See Dan. Ch. Pr. 746. *Watkins & wife v. Carlton*, 10 Leigh, 560.

⁶ II. Dan. Ch. Pr. 746. But see *Watkins & wife v. Carlton*, 10 Leigh 560, in which bills of exception were taken on the trial of issue before common law court, and appellate court, in an appeal from decree in chancery cause, looked to the bills of exceptions filed at common law trial.

such application and refusal may be spread upon the record by bill of exceptions.

§ 331. The plaintiff in an issue may suffer a nonsuit, and if he does so advisedly in consequence of any unforeseen occurrence at the trial, which would have rendered further proceeding with it unsafe, the court which directed the issue will grant him a new trial, notwithstanding the nonsuit.⁷

§ 332. If verdict be not satisfactory to either party, application for a new trial may be made to the court directing the issue,⁸ and the court directing the issue may direct a second, or even a third, trial of the issue, the object of the trial being to satisfy the conscience of this court;* but after three verdicts to the same effect courts of equity will do right in decreeing according to the opinions of juries,⁹ and after two concurring verdicts for the same party, the Court of Chancery is not bound to direct a new trial, though both verdicts are in opposition to the opinions of the judges before whom the issues were tried, and a verdict had originally been rendered in favor of the other party.¹⁰

§ 333. Sometimes, the court, instead of directing an issue, directs the institution of an action at law, and, in that case, the motion for a new trial (if verdict be not satisfactory) should be made before the court in which action is brought. An action at law, instead of an issue out of Chancery, is usually directed whenever the

⁷ IL. Dan. Ch. Pr. 747. 2 Atk. 319.

⁸ Ibid. 747.

* See IL. Dan. Ch. Pr. 748.

⁹ *Stanard v. Graves et als.*, 2 Call 369.

¹⁰ *M' Rae's ex'or v. Wood's ex'or*, 1 Hen. & Munf. 548.

foundation of a claim is a legal demand, and the question whether a new trial should or should not be had, can be discussed with more satisfaction in the court of law than in a court of equity.¹¹

2. *Proceedings in master's or commissioner's office, under orders or decrees for account, &c.*

§ 334. The duties of masters, or, as they are termed in the Virginia State Courts, commissioners, are so various, that we shall not attempt here to detail all of them. We will treat simply of the manner in which accounts and enquiries are taken and proceeded in before these officers.

§ 335. When an order or decree refers the settlement of accounts to a master or commissioner, a copy of such order or decree is furnished him by the party who has obtained such order or decree, and the master or commissioner thereupon appoints a day on which he will proceed to execute the order or decree, and notifies the parties interested of the day and place.¹²

§ 336. In the United States Circuit Courts, the party at whose instance or for whose benefit the reference is made must cause the same to be presented to the

¹¹ II. Dan. Ch. Pr. 763, 764.

¹² See Matthews' Guide to Commissioners, pp. 4, 154. The notice, in the Virginia State Courts, may be given by advertisement in the newspapers, if the court so direct. Code of Virginia, chap. 176, sec. 4. If no such direction be given, and the parties are resident in Virginia, notice must be served on each party, as other notices are served. See Code of Virginia, chap. 167, sec. 1. If party do not reside in Virginia, notice may be given by publication in a newspaper printed in the State, once a week for four successive weeks. Code of Va. chap. 167, sec. 2. In the United States Circuit Courts a personal service on the parties or their solicitors is required in all cases. LXXV. Rule Supreme Court United States.

master for a hearing, on or before the next rule day succeeding the time when the reference was made; and if he omit to do so, the adverse party will be at liberty forthwith to cause proceedings to be had before the master, at the costs of the party procuring the reference.¹³ In the Virginia State Courts, there is no positive statute or decision for the purpose of expediting proceedings before commissioners. A rule formerly prevailed in the Richmond Chancery Court to the effect that an order for an account, if not executed within twelve months from its date, would be inoperative, but now this rule is not in force.

§ 337. The commissioner is authorized to proceed, after such notice, as is mentioned in section 335, though the party fails to attend,¹⁴ and a party failing to attend a commissioner after such notice, subjects himself to process of contempt.¹⁵

§ 338. In the Virginia State Courts, the master or commissioner may adjourn his proceedings from time to time after the notice is given (without a new notice) until his report is completed; and when completed, unless otherwise ordered by the court or agreed by the parties, he retains it for the period of ten days in his office, and if any exceptions be taken meanwhile,¹⁶ or in the progress of the report, they are returned by him with the report, as well as the decrees, orders and notices under which he acted.

¹³ LXXIV. Rule Supreme Court U. S.

¹⁴ 2 Manf. 505.

¹⁵ 2 Rob. Pr. 363; 4 H. & M. 437. See also Code of Virginia, chap. 194, ss. 24, 25, 26.

¹⁶ Exceptions may be made either in the commissioner's office before, or in the court, after, the return of the report.

§ 339. In the United Circuit Courts, if either party fail to appear at the time and place appointed, the master will be at liberty to proceed *ex parte*, or, in his discretion, to adjourn the examination and proceedings to a future day, giving notice to the absent party or his solicitor of such adjournment.¹⁷

§ 340. Parties may be examined on oath before the master in Chancery or commissioner, either in the United States Circuit Courts¹⁸ or in the Virginia State Courts.¹⁹ This examination is usually conducted by interrogatories; and if the party fails to answer, the fact will be reported to the court, which will take action thereon as in the case of other contempts.

§ 341. Parties may also be required by the master or commissioner in chancery to produce books, papers, writings, vouchers and other documents, and upon their failure to do so, a similar report may be made as in last section, with similar results.

§ 342. The master or commissioner may examine witnesses, reducing their examination to writing; and it seems, that in the Virginia State Courts no notice is necessary of the taking of the depositions of witnesses before commissioners, other than the general notice given by the master or commissioner in chancery when the order or decree was first placed in his hand.

§ 343. To obtain the attendance of witnesses, the master is empowered, in the Virginia State Courts, to issue a summons;²⁰ in the United States Courts, he is

¹⁷ EXXV. Rule Supreme Court U. S.

¹⁸ LXXVII. Rule Supreme Court U. S.

¹⁹ See Code of Va. chap. 176, sec. 38.

²⁰ Ibid.

authorized to procure a blank subpoena from the clerk, and signed by the clerk, which may be filled up either by the master or by the party praying the same.²¹

§ 344. In the United States Circuit Courts, if the witness, after being duly served with such summons or subpoena, fail to attend, or, if he attend and refuse to testify, the fact may be reported to the court, and in the one case his attendance before the commissioner will be enforced by the court, and in the other he will be compelled to testify by process of contempt, in like manner as if the contempt were for not attending or for refusing to give testimony in the court.²²

§ 345. In the Virginia State Courts, the rule mentioned in last section prevails, with this limitation: that if the witness, when summoned, demand the pay for one day's attendance, and his mileage and tolls, and it is not paid him, he cannot be compelled to attend.²³

§ 346. In the United States Circuit Courts, it is specially required that "All parties accounting before a master shall bring in their respective accounts in the form of debtor and creditor; and any of the other parties, who shall not be satisfied with the accounts so brought in, shall be at liberty to examine the accounting party *viva voce*, or upon interrogatories in the master's office, or by deposition, as the master shall direct;"²⁴ and "All affidavits, depositions and documents, which have been previously made, read or used in the court, upon any proceeding in any cause or

²¹ LXXVIII. Rule Supreme Court U. S.

²² *Ibid.*

²³ Code of Virginia, chap. 176, sec. 22.

²⁴ LXXIX. Rule Supreme Court U. S.

matter, may be used before the master."²⁵ The master will "be at liberty to examine any creditor or other person coming in to claim before him, either upon written interrogatories, or *viva voce*, or in both modes, as the nature of the case may appear to him to require. The evidence upon such examination shall be taken down by the master, or by some other person by his order and in his presence, if either party requires it, in order that the same may be used by the court, if necessary."²⁶

Reports, how made up and returned.

§ 347. In the Virginia State Courts, the commissioner is required to return with his report all the decrees, orders and notices under which he acted. He should not copy in his account or report any paper; and if there has been a previous account, he should not copy it into his, but, taking it as the basis of his, correct the errors and supply the defects thereof by an additional statement. Every thing improperly copied into a commissioner's account will be expunged at his costs, on the application of either party; and if on account of his negligence or misconduct a report be recommitted, he will bear the costs occasioned thereby.²⁷ A commissioner who doubts as to any point which arises before him, in taking an account to be returned to a Circuit Court, may, in writing, submit the point to such court, or the judge thereof, who may instruct him thereon.²⁸

²⁵ LXXX. Rule Supreme Court U. S.

²⁶ LXXXI. Rule Supreme Court U. S.

²⁷ See Code of Va., chap. 175, sec. 8.

²⁸ Ibid. sec. 6.

§ 348. In the United States Circuit Courts, "In the reports made by the master to the court, no part of any state of facts, charge, affidavit, deposition, examination, or answer, brought in or used before them, shall be stated or recited. But such state of facts, charge, affidavit, deposition, examination, or answer, shall be identified, specified and referred to, so as to inform the court what state of facts, charge, affidavit, deposition, examination or answer, were so brought in or used." ²⁹

Exceptions to report.

§ 349. In the Virginia State Courts, exceptions may be taken either in the commissioner's office or in the court after the report is returned. The report does not stand confirmed as a matter of course; it is confirmed only by special order of the court. In the United States Circuit Courts, "The master, as soon as his report is ready, shall return the same into the clerk's office, and the day of the return shall be entered by the clerk in the order book. The parties shall have one month from the time of filing the report to file exceptions thereto; and if no exceptions are within that period filed by either party, the report shall stand confirmed on the next rule day after the month is expired. If exceptions are filed, they shall stand for hearing before the court, if the court is then in session, or if not, then at the next sitting of the court which shall be held thereafter, by adjournment or otherwise." ³⁰

§ 350. In order to prevent exceptions to reports from being filed for frivolous causes, or for mere delay, in

²⁹ LXXVI. Rule Supreme Court U. S.

³⁰ LXXXIII. Rule Supreme Court U. S.

the United States Circuit Courts, "the party whose exceptions are overruled, shall, for every exception overruled, pay costs to the other party, and for every exception allowed, shall be entitled to costs; the costs to be fixed in each case by the court, by a standing rule of the Circuit Court."³¹

§ 351. Exceptions are of the nature of a special demurrer, and should set forth with sufficient particularity the thing or matter objected to.³² All parties to the record who are interested in the matter in question may take exceptions to the report; and where there are several sets of parties appearing by different solicitors, they may, if not disposed to join, each take exceptions, although their grounds of exception are the same.³³

§ 352. It would be a departure from the design of this work to enter into a discussion of the legal principles on which accounts should be settled. The reader will find, however, in the Appendix, a summary of legal decisions affecting the settlements of accounts, together with various forms.

³¹ LXXXIV. Rule Supreme Court U. S.

³² See 1 Barb. Ch. Pr. 191; also *Wilkes v. Rogers*, 6 John. Rep. 591.

³³ II. Dan. Ch. Pr. 953.

CHAPTER IV.

Of amendments of pleadings, &c.

§ 353. In previous chapters of this work, the attention of the reader has been principally directed to the rules and course of proceeding in a suit originally perfect in its frame, and in which no incidental circumstances have occurred to alter the state of the original parties or the relation in which they stood to each other, at the commencement of the proceeding. In a suit in equity, however, it often happens, that the suit is not perfect in its institution, and it more frequently happens that, though perfect in its institution, it has, by some event subsequent to the filing of the original bill, become defective or has abated, so that no proceeding can be had, either as to the whole or some part of it.

§ 354. Defects in the original institution of the suit, which are discovered in time, may usually be remedied by amendment; other defects are cured, according to the course of English practice, by the exhibition of supplemental bills, when the defects are in the original proceeding or have been occasioned by some event subsequent to the institution of the suit, so that the proceedings as they stand cannot have their full effect, and by the exhibition of bills of revivor, when by some subsequent event there is no person by whom or against

whom the suit, in the whole or in part, can be prosecuted.¹ In some instances, the abatement of the suit gives rise to new matters, which it becomes necessary to introduce into the proceedings, in which cases the proper remedy is by bill of revivor and supplement.²

Amended bills.

§ 355. When a plaintiff has preferred his bill, and is advised that the same does not contain such material facts, or make all such persons parties, as are necessary to enable the court to do complete justice, he may alter it by inserting new matter subsisting at the time of exhibiting his bill, of which he was not then apprized, or which he did not think necessary to be stated, and may add such persons as shall be deemed necessary parties.³ In the United States Circuit Courts, as in the Virginia State Courts, the face of the original bill, after answer, is never altered or added to; the new matter is usually introduced on a separate paper, which is termed an amended bill. Before answer, the face of the original bill itself is sometimes altered or added to, and this seems to be contemplated as the practice in United States Circuit Courts by the rules adopted for their use by the United States Supreme Court;⁴ but in the Vir-

¹ III. Dan. Ch. Pr. 150. As we have seen. in a note to a previous section, bills of revivor simply are rarely, if ever, used in the Virginia State Courts. The usual mode of reviving a suit in these Courts is that pointed out in sections 88, 89, 90, 91, *ante*.

² III. Dan. Ch. Pr. 150.

³ I Dan. Ch. Pr. 508. Daniell adds to the statement contained in the text, "that in case the original bill shall be found to contain matter not relevant or no longer necessary to plaintiff's case, or parties may be dispensed with, the same may be struck out, and the original bill thus altered is termed an 'amended bill.'"

⁴ See XXVIII. Rule Supreme Court U. S.

ginia State Courts it is the usual practice, even before answer, not to alter the face of the original bill in a material point, but to introduce the amendment by a separate paper, calling it "an amended bill."

§ 356. When there is a bill or cross bill, and the plaintiff in the original suit amends his bill before answer, he will lose his priority of suit, and his right to have an answer before he is called upon to answer the cross bill.⁵

§ 357. Usually, matters which have occurred subsequently to the filing of the original bill, will not be permitted to be introduced by amendment. In such cases, as we have seen, the regular course is to file a supplemental bill; but there are cases in which such amendments will be allowed. Thus, where the plaintiff has an inchoate right at the time of exhibiting his original bill, merely requiring some formal act to render his title perfect, and that act is not completed till after filing of the original bill, the introduction of that fact by amendment will be permitted.⁶

§ 358. It was formerly the practice in the Virginia State Courts, before amending bills, to obtain the special leave of the court to amend; but it is now declared by statute that in the Virginia State Courts the plaintiff may of right amend his bill before the defendant's appearance, and notwithstanding such appearance the plaintiff may at any time in the vacation of the Court wherein the suit is pending, file in the clerk's office an amended bill.⁷ In the United States Circuit

⁵ I. Dan. Ch. Pr. 509.

⁶ I. Dan. Ch. Pr. 511.

⁷ See Code of Va. chap. 171, sec. 14.

Courts, the plaintiff is at liberty, as a matter of course and without payment of costs, to amend his bill in any matters whatsoever, before any copy has been taken out of the clerk's office, and in any small matters afterwards, such as filling blanks, correcting errors of dates, misnomer of parties, misdescription of premises, clerical errors, and generally in matters of form;⁸ if a copy has been taken out, before an answer or plea or demurrer, the plaintiff may amend his bill in a material point, but he is required to pay the defendants the costs occasioned thereby, and to furnish without delay, free of expense, to each of the defendants affected thereby, a fair copy of the amendments, with suitable references to the places where such are to be inserted; and if the amendments are numerous, a fair copy of the whole bill;⁹ after an answer, or plea or demurrer is put in, and before replication, the plaintiff may, upon motion or petition without notice, obtain an order from any judge of the court to amend his bill on or before the next succeeding rule day, upon payment of costs or without payment of costs, as the court or a judge thereof may in his discretion direct; but after replication filed, the plaintiff will not be permitted in these courts to withdraw it and amend his bill, except upon a special order of a judge of the court upon motion or petition, after due notice to the other party, and upon proof by affidavit that the same is not made for the purpose of vexation or delay, or that the matter of the proposed amendment is material, and could not, with reasonable diligence, have been sooner introduced into the bill, and upon the plaintiff's submitting to such

⁸ XXVIII. Rule Supreme Court U. S.

⁹ Ibid.

other terms as may be imposed by the judge for speeding the cause.¹⁰

§ 359. A plaintiff obtaining special leave of the United States Circuit Courts to amend his bill as mentioned in last section, who fails to file his amendments or amended bill, as the case may require, in the clerk's office, on or before the next succeeding rule day after obtaining such leave, will be considered as having abandoned the same, and the cause will proceed as if no application for any amendment had been made.¹¹

§ 360. See 46th rule of Supreme Court of United States, printed in Appendix to this volume, as to duty of defendant when an amended bill has been filed, after answer, in the United States Circuit Courts.

Supplemental bills.

§ 361. As we have seen, supplemental bills may be filed to remedy defects in a suit, either when they exist at the time of filing the original bill, and it is too late to correct them by amendment, or when they have occurred since the filing of the original bill, in consequence of the birth of new parties, or a change in the interests of those originally on the record.¹²

§ 362. When a plaintiff has an inchoate right at the time of filing his original bill, and it merely requires a formal act to complete it, he may introduce such fact into the record by an amendment of the bill, or he may file a supplemental bill.¹³ A plaintiff, however,

¹⁰ XXIX. Rule Supreme Court U. S.

¹¹ XXX. Rule Supreme Court U. S.

¹² III. Dan. Ch. Pr. 150.

¹³ III. Dan. Ch. Pr. 153.

cannot support a bad title, by acquiring another after the filing of an original bill, and then bringing it forward by supplemental bill;¹⁴ yet it is to be remarked that it is only where the first title is absolutely bad, that a supplemental bill of this description will be improper.¹⁵

§ 363. Supplemental bills will not be allowed for the purpose of introducing a completely new case; they must be in aid of that which the court has already done; still less can they be maintained for the purpose of adding to the decree, what, upon the hearing, the court has excluded from it.¹⁶

§ 364. It is not every fact which has occurred subsequent to the filing of the original bill, which renders a supplemental bill necessary; such facts must be material, and therefore, in a suit for an account, where there is no alteration in the interests of the parties, nor any particular circumstances requiring further discovery, but only a fact has occurred which may be proved on taking the account prayed by the original bill, and the relief is not varied by the supplemental matter, but the plaintiff might have the relief which the supplemental bill prays for, under the original bill, the supplemental bill is improper, and may be demurred to.¹⁷

§ 365. When a sole plaintiff has assigned his whole interest, or has been deprived of it by an event subsequent to the institution of a suit, the alienee, or party claiming his title, must proceed by *an original bill in*

¹⁴ *Ibid.* See *Tonkin v. Lethbridge*, Cooper's Rep. 43.

¹⁵ III. Dan. Ch. Pr. 154.

¹⁶ III. Dan. Ch. Pr. 159.

¹⁷ III. Dan. Ch. Pr. 160.

*the nature of a supplemental bill, and not by a supplemental bill.*¹⁸

§ 366. A supplemental bill should state the original bill, and the proceedings thereon.¹⁹ If the supplemental bill is occasioned by an event subsequent to the original bill, it must state that event, and the consequent alteration of parties thereon, and it must pray that the defendants may appear and answer to the charges it contains.²⁰ If the supplemental bill has been rendered necessary by the alteration or acquisition of interest happening to a defendant, or a person comes into *esse* who is necessary to be made a defendant, the supplemental bill may be exhibited by the plaintiff in the original suit against such person alone, and may

¹⁸ III. Dan. Ch. Pr. 164. This distinction may, at first sight, appear artificial, but it is attended by a considerable difference in the practical results. In cases in which a supplemental bill only is filed, if there has been no decree, the suit may proceed after the supplemental bill has been filed, in the same manner as if the original plaintiff had continued such, except that the defendants must answer the supplemental bill and either admit or put in issue the title of the new plaintiff; but, in the case of an original bill, in the nature of a supplemental bill, the whole case is open; a new defence may be made, the pleadings and depositions cannot be made use of in the same manner as if filed or taken in the same cause, and the decree, if any has been obtained, is no otherwise of advantage than as it may be an inducement to the court to make a similar decree; whilst, in the case of a mere supplemental suit, the benefit of the original decree, if obtained, is expressly given to the new plaintiff by the supplementary decree, and he is declared entitled to stand in the place of the plaintiff in the original bill, and to have the benefit of the proceedings upon it, and to prosecute the decree, and take the steps necessary to render it effectual. III. Dan. Ch. Pr. 164.

¹⁹ III. Dan. Ch. Pr. 175. This is the general rule; but in the United States Circuit Courts, it is expressly provided that it shall not be necessary in any bill of revivor or supplemental bill to set forth any of the statements in the original suit, unless the special circumstances of the case may require it. LVIII. Rule Supreme Court U. S.

²⁰ III. Dan. Ch. Pr. 178.

pray a decree upon the particular supplemental matter alleged against that person only; unless, which is frequently the case, the interests of the other defendants may be affected by that decree, in which case such other defendants must be made parties.²¹ A supplemental bill generally calls upon the defendant to answer the supplemental matter only; if, however, it is occasioned by the transmission of the interest of a defendant who has not answered the original bill, and it is necessary to have a discovery from the new defendant of the matters in the original bill, it may pray that the defendant may answer the original bill.²²

§ 367. In the United States Circuit Courts, whenever any suit in equity shall become defective, from any event happening after the filing of the bill (as for example, by a change of interest in the parties,) or for any other reason, a supplemental bill, or a bill in the nature of a supplemental bill, may be necessary to be filed in the cause, leave to file the same may be granted by any judge of the court on any rule day, upon proper cause shown, and due notice to the other party. And if leave is granted to file such supplemental bill, the defendant shall demur, plead or answer thereto, on the next succeeding rule day after the supplemental bill is filed in the clerk's office, unless some other time shall be assigned by a judge of the court.²³ In the Virginia State Courts a plaintiff may file a supplemental bill, without such leave and without notice.²⁴

²¹ III. Dan. Ch. Pr. 179.

²² Ibid, 181.

²³ See LVII. Rule Supreme Court U. S.

²⁴ Code of Virginia, chap. 171, sec. 14.

Bills of revivor.

§ 368. When a suit, perfect in its original formation, afterwards becomes discontinued or imperfect by abatement, the general method of continuing it or of remedying the defects in the English Courts and in the United States Circuit Courts, is by bill of revivor;²⁵ as we have seen, in the Virginia State Courts, defects of this character may be remedied by the issue of a writ of scire facias,²⁶ and in these courts it is not the usual practice to file a bill of revivor simply.

§ 369. While, in the English Courts, or in the United States Circuit Courts, when an abatement takes place before decree signed and enrolled, a bill of revivor is the only proceeding by which the suit may be continued, after a decree has been signed and enrolled, the party wishing to continue it may proceed either by bill of revivor, or by a subpoena in the nature of a scire facias.²⁷

§ 370. It is not every death of a party to a suit which occasions such an abatement as will suspend the proceedings; if the interest of the party dying so determines that it can no longer affect the suit, and no person becomes entitled thereupon to the same interest, or if the whole interest of the party dying survives to another party, the suit may go on without revivor.²⁸

§ 371. If a bill of revivor seeks merely to revive the suit, it prays simply for a subpoena to revive; if it re-

²⁵ See LVI. Rule Supreme Court U. S.

²⁶ See section 88, *ante*.

²⁷ III. Dan. Ch. Pr. 197.

²⁸ See III. Dan. Ch. Pr. 202.

quires any answer, as in the case of a bill against an executor, requiring him to admit assets, it should pray a subpoena to revive and answer.²⁹

Bills of revivor and supplement.

§ 372. These are bills combining the characteristics of the bill of revivor with those of supplemental bills.³⁰

Defences to amended bills, &c.

§ 373. To these several bills the defendant may, as in the case of original bills, plead, answer or demur; and while many of the causes of demurrer or plea which apply to an original bill will apply to these bills, there are some grounds on which these several modes of defence may be made, which are solely applicable to these bills. Thus, if the plaintiff amends his bill and states a matter arisen subsequent to the filing of the bill and properly the subject of a supplemental bill or bill of revivor, the defendant may demur;³¹ or if a supplemental bill is brought upon matter arising before the filing of an original bill, when the suit is in that stage of the proceeding that the bill may be amended, the defendant may demur;³² and so, if the same plaintiff file a supplemental bill claiming the same matter as in an original bill, but upon a title totally distinct, the defendant may demur;³³ and, the defendant may plead in defence to a supplemental bill, that it is brought on matter which

²⁹ III. Dan. Ch. Pr. 215. See LVI. Rule Supreme Court U. S.

³⁰ See III. Dan. Ch. Pr. 232.

³¹ I. Dan. Ch. Pr. 550. He may also protect himself from the effects of the amendments by plea. Ibid.

³² III. Dan. Ch. Pr. 183.

³³ Ibid.

arose before the original bill was filed, and might have been introduced into the original bill, if this fact does not appear upon the supplemental bill.

§ 374. A bill of revivor, also, is liable to demurrer for reasons peculiar to its character—thus, if it does not shew sufficient ground for reviving the suit, or any part of it, either by or against the person by or against whom it is brought, the defendant may demur.³⁴ And, it is liable to a plea of a similar character, when there is not sufficient cause to revive and the fact is not apparent on the bill:—the defendant in such case may plead the matter necessary to shew that the plaintiff is not entitled to revive the suit against him, or that the plaintiff is not entitled to revive his suit at all.³⁵

§ 375. An answer may be filed to a bill of revivor, whether required or not.³⁶ Though in strict practice, an answer to such bill should be confined to such matters as are called for by the bill or would be material to the defence with reference to the order made upon it, yet the answer will not be impertinent, if it states matters of defence which have occurred since the answer to the original bill was filed, although such matters do not affect the title of the plaintiff to revive.³⁷

§ 376. Bills of revivor and supplement are liable to the same descriptions of defence as these bills, if separate, would be liable to.³⁸

§ 377. These several bills, pleas, answers and demurrers, have the same general frame with that al-

³⁴ III. Dan. Ch. Pr. 218.

³⁵ Ibid.

³⁶ See III. Dan. Ch. Pr. 220.

³⁷ Ibid.

³⁸ III. Dan. Ch. Pr. 232.

ready pointed out in preceding chapter in regard to original bills and the defences thereto, and should be attended with the same formalities in regard to signing, filing, &c.

NOTE.

The following summary of Mr. Daniell in relation to the ordinary effects of abatement and revivor, in the English Courts, upon the proceedings of a cause, will be found useful to the practitioner :

"Where the abatement is total, *i. e.*, where it is caused by the death, bankruptcy, insolvency, or marriage of the plaintiff, (being a female,) the cause is completely suspended and cannot be proceeded in, till it has been revived, or the defect, caused by the abatement, cured by supplemental bill, and, in general, all orders made pending such abatement, will be considered nugatory, and may be discharged. The same rule will also apply where the abatement has been caused by the death of one or more plaintiffs. Thus if, pending a total abatement, process of contempt is issued, it will be irregular, and may be discharged on motion with costs, and if a defendant is arrested on any process pending such abatement, he will be discharged, from such arrest, with costs. So also, an order to dismiss a bill for want of prosecution, obtained pending an abatement will be irregular.

It is to be observed, however, that, although the general rule is as above stated, there are many cases in which the Court will entertain applications although the suit is abated. Thus it will entertain a motion to discharge process of contempt issued or executed pending an abatement; so also, although no regular order to dismiss a bill for want of prosecution can be obtained before revivor, the Court will, as we have seen, if the plaintiff, or his representatives, or the surviving plaintiffs, omit to revive the suit within a reasonable period, make an order that they shall file a bill of revivor within a limited time or else that the bill shall be dismissed.

It has, also, where the right to money in Court has been clear under former orders and reports, made an order upon petition for payment of the money out of Court, to the party entitled without regarding the abatement, or for the delivery of deeds and writings brought into Court, or it will send it to the Master for inquiry to whom they belong.

We have seen also, that a commission to examine witnesses abroad will not be affected by an abatement of the suit, and that depositions taken under it, (provided neither the commissioners nor the witnesses have received notice of the abatement,) will be good.

An enrolment of a decree may also be made, and an order to do so, *non pro tempore*, may be made, notwithstanding an abatement.

Where, however, the suit abates after a decree has been pronounced, but before it is passed, there must be a revivor before it can be passed.

It is to be recollected that the Statute of Limitations will run, pending an abatement, in all cases except a decree to account.

Amendments of answers.

§ 378. As we have seen in a previous section,³⁰ after an answer has been put in upon oath, the court will not, for obvious reasons, readily suffer any alterations

It is to be observed, that an abatement, although it suspends proceedings in a cause, does not put an end to them; therefore, where process of contempt has been executed, and a defendant is in custody upon it, and afterwards the suit abates, the defendant is not thereby entitled to his discharge out of custody, but he must move that the plaintiff may revive within a limited time, or that the bill may be dismissed and he may be discharged. So also, an injunction is not dissolved by an abatement, but the defendant must, if he wishes to get rid of the injunction, move that the plaintiff may revive within a limited time, or that the injunction may be dissolved. The same observations may apply to receivers appointed under an order of the Court, who are not discharged on abatement without an order of the like description.

Where an abatement is partial, e. g. where it is caused by the death of a defendant, it prevents those proceedings only by which the interest of the deceased defendant may be affected; for the death of a defendant makes an abatement *quoad* himself alone: therefore, if there be a decree against trustees and their *cestui que trust* to convey, and the *cestui que trust* dies, the trustees may be compelled to convey, notwithstanding his death. So also, pending an abatement, by the death of a defendant, process of contempt may be issued and executed against the other defendants; and, we have before seen, that, during such an abatement, the Court will, at the instance of a creditor, take the prosecution of a decree from the plaintiff.

It has, also, been held, that the death of a defendant, after hearing but before judgment, does not necessarily prevent judgment; but where, upon a motion to dismiss for want of prosecution, the plaintiff appears and undertakes to set the cause down for hearing within a limited time, in default of which the bill is to stand dismissed, and afterwards the defendant dies, and the time for setting the cause down expires before the suit can be revived, the order dismissing the bill is suspended during the abatement.

We have already seen that where a bill against several defendants is retained, with liberty for the plaintiff to bring an action against one of them, the trial may take place during an abatement occasioned by the death of another defendant, provided such other is not directed by the decree to attend the trial, in which case a trial before the suit is revived against such defendant will be irregular.

³⁰ See. 154, p. 69.

to be made in it. We allude merely to alterations in material points. In any matter of form, or other unimportant matter, such as correcting a date, filling up a blank, and the like, these amendments may be made as of course. This is allowed by special rule in the United States Circuit Courts,⁴⁰ and it is the practice in the Virginia State Courts; yet, after alterations of this kind, the answer should be re-sworn to. But after replication, or after the cause is set down for a hearing, an answer will not be amended, in the United States Circuit Courts, in any material matters, as by adding new facts or defences, or qualifying or altering the original statements, except by special leave of the court or of a judge thereof, upon motion and cause shown, after due notice to the adverse party, supported, if required, by affidavit; and in every case where leave is so granted, the court or judge granting the same may, in his discretion, require that the same be sepa-

Where the abatement of a suit is total, an order to revive places the suit and all the proceedings in it, in precisely the "same plight, state, and condition that the same were in at the time when the abatement took place," and the new plaintiff may take the same proceedings in the cause that the original plaintiff might have done; thus the plaintiff in a revived suit may amend the original bill in the same manner that the original plaintiff might have done, and may issue an attachment against the defendant for not answering the amended bill. So also, the new plaintiff may prosecute process of contempt against the defendant, taking it up where it left off at the abatement; and if a process has been issued before the abatement, it will be revived by the order to revive.

The case is different where the abatement is occasioned by the death of a defendant; in such case, the process being personal, cannot be revived. In general, however, where an abatement is occasioned by the death of a defendant, the order to revive against the representatives of such defendant will place the suit as fully in the same position with regard to such representatives as can be done, with reference to the change of the individuals before the Court." III. Dan. Ch. Pr. 223, *et seq.*

⁴⁰ LX. Rule Supreme Court U. S.

rately engrossed, and added as a distinct amendment to the original answer, so as to be distinguishable therefrom.⁴¹ In the Virginia State Courts, the leave to amend an answer, if deemed proper by the Court, is granted after due notice to the adverse party.

CHAPTER V.

Interlocutory applications.

§ 379. An interlocutory application is a request made to the court for its aid in a matter arising in the course of the cause. It may either relate to the process of the court, or to the protection of the property in litigation *pendente lite*, or to any other matter upon which the interference of the court is required at any time. Applications of this kind are made either orally or in writing—in the former case, they are called *motions*; in the latter *petitions*.¹

MOTIONS.

§ 380. There are motions *of course* and *special* motions. The former may be made without notice to the opposite party; the latter can only be made after reasonable notice.

⁴¹ L.X. Rule Supreme Court U. S.

¹ I. Barb. Ch. Pr. 565.

§ 381. Motions may be made by or on behalf of any of the parties, or by a *quasi* party (as in the case of a creditor coming in under a decree,) but strangers to the record may not apply to the court by motion; such should file a petition.

§ 382. The distinctive differences between motions of course and special motions, seem not to be very well settled; the former, however, are defined to be such as it is a matter of course to grant, while the latter need some ground to be laid for them, either by the previous order, or by the pleadings in the cause, or by affidavits.

PETITIONS.

§ 383. These are applications in writing for an order of court, stating the circumstances upon which they are founded, and are duly entitled of the cause and court in which they are to be filed. They are usually resorted to whenever the nature of the application to the court requires a fuller statement than can be conveniently made in a notice of motion.² Strangers to the record are, as we have seen, required to file a petition, when those who are parties may obtain the relief sought by mere motion.

§ 384. Brevity and form are the two things chiefly to be observed in drawing petitions; to which may be added, care to avoid scandal or impertinence, for which a petition, as well as any other proceeding, may be referred.³

§ 385. In some of the State Courts of the Union, petitions are required to be signed and sworn to by the

² I. Barb. Ch. Pr. 578.

³ I. Barb. Ch. Pr. 580.

petitioner and signed by his solicitor and counsel. In the United States Circuit Courts, and in the Virginia State Courts, the petition is signed by the petitioner, and it is sometimes accompanied by an affidavit of the truth of the facts stated in it.

§ 386. It is not the practice to institute either in the United States Circuit Courts, or in the Virginia State Courts, an equity proceeding by petition. They are usually filed in suits already pending, or which have been pending in these courts.

ORDERS.

§ 387. In a previous section,⁴ it was stated that a distinction had been made in the books between decrees proper and interlocutory orders, the former referring to such adjudications or orders as the court may make at the hearing, and the latter having reference to orders not made at the hearing of the cause, *i. e.* when the parties are not fully at issue before the court. The latter are technically termed "orders," to distinguish them from decrees.

§ 388. These orders generally pertain to matters, merely collateral, nor going to the adjudication of the questions in issue. Sometimes they are intended to hasten the maturing of the cause; at others, to take care of the property in controversy; at others, to compel the appearance of a party. It is evident therefore, that these orders may be made either before or after the cause is matured.

§ 389. There are orders of course or common orders, and special orders; the former made as of course with-

⁴ Section 237.

out notice to the opposite party, and the latter requiring such notice.

§ 390. In the United States Circuit Courts, orders may be made at Chambers, by the Judge, or on the rule days,⁵ and these orders are entered in an order-book kept for the purpose by the clerk. Save where personal or other notice is specially required or directed, the clerk's entry in the order-book in these courts is deemed sufficient notice to the parties or their solicitors, without further service thereof, of all orders touching any and all the matters in the suits, to and in which they are parties and solicitors.⁶

§ 391. In the Virginia State Courts, save in special cases, such as the granting of an injunction, and the like, and saving those orders granted by the clerk at rules, orders are usually entered by the court during term time.

§ 392. Orders, like decrees, may be enforced by the process of contempt.⁷ Orders are always under the control of the court; they may be opened, varied and discharged, upon application, if the court deem it reasonable,⁸ but an order or decree by consent cannot be varied or modified in an essential point without the assent of both parties.⁹

AFFIDAVITS.

§ 393. An affidavit is an oath in writing, sworn to before some person who has authority to administer an

⁵ III. Rule Supreme Court U. S.

⁶ IV. Rule Supreme Court U. S.

⁷ II. Dan. Ch. Pr. 593.

⁸ I. Barb. Ch. Pr. 595.

⁹ I. Barb. Ch. Pr. 596. *Leitch v. Cumpston*, 4 Paige, 476.

oath;¹⁰ when to be used in a cause, an affidavit should be properly entitled of the cause and the court in which suit is pending.¹¹

§ 394. Affidavits may be made by the parties in the suit during the progress thereof; but they can only be read on motions, &c.; they are inadmissible as evidence at the hearing.¹²

§ 395. Affidavits, like other pleadings in equity, should not contain scandalous or impertinent matter.¹³

INJUNCTIONS AND WRITS OF *NE EXEAT*.

§ 396. Injunctions and writs of *ne exeat*, though they may be obtained in an equity proceeding, after the institution of a suit, are usually granted prior to the institution of a suit, and will therefore be treated of in another chapter.

RECEIVERS.

§ 397. These are usually appointed by the court to receive the rents and profits of land or other property or things in question pending the suit, where it does not appear reasonable that either party should do so.¹⁴ The appointment of receivers rests in the discretion of the court.

ABATEMENT AND REVIVOR.

§ 398. The abatement of a suit in equity is merely an interruption to the suit, suspending its progress until

¹⁰ I. Barb. Ch. Pr. 597.

¹¹ I. Barb. Ch. Pr. 600.

¹² Ibid. 599.

¹³ Ibid. 602.

¹⁴ I. Barb. Ch. Pr. 658.

new parties are brought before the court; and whenever a suit abates, there must be a revival, before the questions in issue can be adjudicated by the court.

§ 399. In the United States Circuit Courts, whenever a suit in equity becomes abated by the death of either party, or by any other event, the same may be revived by a bill of revivor, or a bill in the nature of a bill of revivor, as the circumstances of the case may require, filed by the proper parties entitled to revive the same: which bill may be filed at any time; and upon suggestion of the facts, the proper process of subpoena will be issued by the clerk, requiring the proper representatives of the other party to appear and shew cause, if any they have, why the cause should not be revived; and if no cause is shewn at the next rule day which shall occur after fourteen days from the time of the service of the subpoena, the suit will stand revived as of course.¹⁵ In the Virginia State Courts, as we have seen, a suit in equity may be revived without resorting to a bill of revivor.¹⁶ See Book II. Chap. IV. *ante*.

¹⁵ LVI. Rule Supreme Court U. S.

¹⁶ See Sec. 88, *ante*.

CHAPTER VI.

INJUNCTIONS AND WRITS OF NE EXEAT.

§ 400. A writ of injunction may be described as a judicial process whereby a party is required to do a particular thing, or to refrain from doing a particular thing, according to the exigency of the writ.¹ The object of this process, which is extensively used in equity proceedings, is generally preventive and protective rather than restorative; though it is by no means confined to the former.² It seeks to prevent a meditated wrong more often than to redress an injury already done. It is not confined to cases falling within the exercise of the concurrent jurisdiction of the court; but it equally applies to cases belonging to its exclusive and auxiliary jurisdiction.

§ 401. Injunctions are usually granted on bills specially prepared with the view to obtain the injunction order of the court, anterior to the institution of the suit; but they may be obtained subsequent to institution of suit and to the filing of original bill.

§ 402. Injunctions are either provisional, general or perpetual. Provisional injunctions are such as are to continue until the coming in of defendant's answer,³ or

¹ Gilb. For. Rem. 192, 194.

² Story Eq. Juris., sections 156, 156.

³ See *Turner v. Scott, &c.*, 5 Rand. 332.

until the hearing of the cause, or until the Master has made his report.⁴ A general injunction is the process ordinarily employed in a cause, and continues in force until the further order of the Court.⁵ Perpetual injunctions are such as form part of the decree made at the hearing upon the merits, whereby the defendant is perpetually inhibited from the assertion of a right, or perpetually restrained from the commission of an act which would be contrary to equity and good conscience.⁶

§ 403. An injunction will not be ordered, or the writ issued, in any case, until the bill has been filed; and usually the bill must pray specially for an injunction, and be verified by affidavit, as an injunction will not be granted under a prayer for general relief, unless the necessity for it grows out of the proceedings, and not from the original situation of the parties.⁷

§ 404. Injunctions are, in the United States Circuit Courts, granted by those courts when in session, or by a judge thereof in vacation. The Virginia Circuit, County or Corporation Courts may grant injunctions in term time, except that a County or Corporation Court shall not award an injunction to a judgment or proceeding of any other court; and Judges of Circuit Courts in Virginia are empowered to grant injunctions in vacation.⁸

And when a Circuit Court or a Judge thereof refuses to award an injunction, a copy of the proceedings in

⁴ 1. Barb. Ch. Pr. 668.

⁵ 1. Barb. Ch. Pr. 612.

⁶ Ibid. 613.

⁷ 1. Barb. Ch. Pr. 615, and cases there cited. See Code of Virginia, chap. 179, sec. 3; a special statute as to granting of injunctions in Virginia.

⁸ See Code of Virginia, chap. 179, sec. 4 and 6.

Court, and the original papers presented to the Judge in vacation, with his order of refusal, may be presented to a Judge of the Court of Appeals, who may thereupon award the injunction.⁹

§ 405. Injunctions may be applied for *ex parte*, or upon notice, or upon an order to shew cause. The application is usually *ex parte*, if made before the defendant has appeared, but the court or judge may require notice to be served on the defendant, or may enter an order to shew cause why the injunction should not be granted; in either of which cases, he will have an opportunity to appear and contest the right of the plaintiff to have an injunction issue.¹⁰

§ 406. Usually, when an injunction is granted, the party obtaining the injunction is required to give bond in a sufficient penalty, affixed by the court, with such condition as the court may prescribe; and, in the Virginia State Courts, when an injunction to a judgment or decree is obtained, the statute specially prescribes that the bond shall be conditioned that the party obtaining the injunction shall pay the judgment or decree, (proceedings on which are enjoined,) and all such costs as may be awarded against him, and all such damages as may be incurred in case the injunction be dissolved; and, in case a forthcoming bond has been given under said judgment or decree, the bond should be further conditioned to indemnify and save harmless the sureties in said forthcoming bond, and their representatives against all loss or damage in consequence of said suretyship.¹¹

⁹ See Code of Virginia, chap. 179, sec. 7.

¹⁰ See Code of Virginia, chap. 179, sec. 3.

¹¹ See Code of Virginia, chap. 180, sec. 10.

§ 407. In the case of a personal representative or other person, from whom, in the opinion of the court or judge awarding the injunction, it may be improper to require a bond, bond will not be required.¹²

§ 408. If the injunction be to a judgment or decree, the bond will be given before the clerk of the court in which such judgment or decree was rendered; in other cases, the bond will be given before the clerk of the court in which the suit is, wherein the injunction is awarded.¹³

§ 409. When an injunction is granted to a judgment, it is the practice to require the plaintiff in injunction bill to execute a release of errors at law. This practice is founded upon the general principle of equity that a party shall not be permitted to sue both at law and in equity, for the same thing.¹⁴

§ 410. Injunctions may be dissolved in vacation, in the Virginia State Circuit Courts, after reasonable notice to the adverse party;¹⁵ but in these courts, as in the County and Corporation Courts, the usual practice pursued is, to move for a dissolution of the injunction at the first term after it has been granted. In term time, injunctions granted in the Circuit Courts, or the County or Corporation Courts, may be dissolved.

¹² See Code of Virginia, chap. 180, sec. 10.

¹³ See Code of Virginia, chap. 180, sec. 10.

¹⁴ 11 Rob. Pr. 240, and cases there cited. Sometimes a party who is defendant in an action at law, comes into equity for relief, while the action is still pending. In such case, the general rule is, that he must confess judgment at law, and rely solely on the Court of Equity for relief. And should an injunction to the proceedings at law be awarded without directing such confession, upon motion to the Court of Equity it will order the injunction to stand dissolved, unless judgment be confessed. *Warwick, &c. v. Norvell*, 1 Leigh, 96.

¹⁵ Code of Virginia, chap. 180, sec. 12.

§ 411. In the Virginia Circuit Courts, when an injunction is wholly dissolved, the bill will stand dismissed, of course, with costs, unless sufficient cause be shewn against such dismissal at the next term; when such injunction has been wholly dissolved, and the bill is pending in a County or Corporation Court, the bill will be dismissed, of course, with costs, unless sufficient cause be shewn against such dismissal, at or before the second term after the dissolution, whether a monthly or quarterly term.¹⁶

§ 412. As in other cases, so here, either party may appeal from a decree of court dissolving or perpetuating an injunction.

WRIT OF NE EXEAT.

§ 413. This writ, originally applicable to purposes of State only, was afterwards extended to private transactions.¹⁷ Its design was to prevent a party from fleeing the country to avoid the payment of a just demand or to avoid the justice and equity of the court, and was, in its original conception, confined to cases where the claim upon the party going abroad was equitable, in opposition to a legal demand on which the defendant might be arrested and obliged to give bail.¹⁸ This original purpose of the writ has been strictly adhered to, and the writ is not granted save on equitable claims.¹⁹

¹⁶ Code of Virginia, chap. 179, sec. 14.

¹⁷ III. Dan. Ch. Pr. 375.

¹⁸ Ibid.

¹⁹ The only exception to the rule in England, says Daniell, which requires the demand to be equitable, is in the instance of alimony decreed by the Spiritual Court, in which Court, as the Spiritual Court cannot take bail, this Court will lend its assistance to the woman. See III. Dan. Ch. Pr. 376.

§ 414. In the Virginia State Courts, the Code of Virginia abolished the right to hold the party defendant to bail in any action at common law; and the spirit of that enactment was extended to equitable demands, by a failure on the part of the Legislature to re-enact former statutes giving the courts of the State authority to issue writs of *ne exeat*.²⁰ So that, in these courts, writs of *ne exeat* are now not used.

§ 415. The right to grant writs of *ne exeat regno* is recognized as existing in the United States Circuit Courts, by the rules prescribed for the use of these courts;²¹ and in these courts, the rule just laid down in regard to the issuing of this writ prevails, to-wit: that the claim upon which the writ is sought to be obtained must be an equitable claim.

§ 416. It is presumed, in the absence of express authority on the point, that these courts will not issue writs of *ne exeat* in any case arising in a State where, by express legislation, the right to hold to bail in an action at common law has been abolished, and the right to issue writs of *ne exeat* has been taken away from the State Courts; as in Virginia.²²

§ 417. The form of a writ of *ne exeat*, as formerly used in the Virginia State Courts, and specially prescribed by statute, was as follows:

²⁰ See Code of Virginia, chap. 170, sec. 5, and note to that section, p. 643.

²¹ XXI. Rule Supreme Court U. S.

²² The spirit of the Virginia Statutes has been expressly carried out by the United States Circuit Court for the fourth Circuit and Eastern District of Virginia.

"The Commonwealth of Virginia to the sheriff or coroner of _____ county, (or serjeant of the city, corporation or borough of _____,) greeting: Whereas it is represented to the court of the county of _____, or to the court of the city or borough of _____, (as the case may be,) or to two of the members of one of the aforesaid courts, viz: A. B. and C. D., two justices or aldermen, (as the case may be,) on the part of E. F., in a suit instituted by him against G. H. defendant, that the said G. H. designs quickly to leave this Commonwealth, as by oath made in that behalf appears, which tends to the great prejudice and damage of the said E. F.; therefore, in order to prevent this injustice, you are hereby commanded that you do, without delay, cause the said G. H. to come before you, and give sufficient bail or security in the sum of _____, that he will not go, or attempt to go, out of the limits of this Commonwealth, without the leave of our said court, or performing such decree as may be made in the suit aforesaid; and, in case the said G. H. shall refuse to give such bail or security, then you are to commit him to the jail of your county, city or borough, (as the case may be,) there to be kept in safe custody, until he shall do so of his own accord; and, when you have taken such security, you are forthwith to make and return a certificate thereof to the justices of our said court, distinctly and plainly, under your seal, together with this writ.

"Witness, W. G. S., clerk of our said court, on this day of _____, and in the _____ year of the Commonwealth of Virginia.

W. G. S., Clerk."

§ 418. The application for a writ of *ne exeat regno* is usually made upon a bill praying specially the issue of the writ, with proper affidavit of the truth of the statements contained in the bill.²³

§ 419. The bill must be accompanied by an affidavit, which should be positive to a debt or to the belief

²³ The XXI. Rule of Supreme Court U. S. expressly requires a special prayer.

of the plaintiff that a certain balance of account is due.²⁴

§ 420. The general rule prevailed in the English courts, that the writ of *ne exeat* is only applicable to equitable demands, and that there must be not only an equitable demand, but one in the nature of a debt actually due; and this rule has been followed in American cases.²⁵ Chancellor Kent, however, in the case of *Porter v. Spencer*, 2 John. Ch. Rep. 169, reviewed the English adjudications, and came to the conclusion that the rule against the allowance of the writ, where the matter was of legal cognizance, was not inflexible, but would yield to cases of necessity, when justice would be defeated without the aid of the writ.²⁶

²⁴ *Gernon v. Boecaline*, 2 Wash. C. C. R. 130. In *Thorne v. Halsey*, 7 John. Ch. Rep., 189, the plaintiff did not swear positively to any indebtedness. This was considered a fatal defect, and the writ was discharged. The rule seems to be this—while the plaintiff must swear positively that a balance is due, he need not swear to any sum. See 11 Rob. Pr. 198.

²⁵ See *Seymour v. Hazard*, 1 John Ch. Rep. 1, and *Snedberg v. Mark*, 6 Id. 138, cited by Robinson.

²⁶ But see *Nixon v. Richardson*, 4 Desau. 108.

CHAPTER VII.

Bills of interpleader, bills to perpetuate testimony, bills to examine witnesses de bene esse, bills of discovery, cross bills, and bills of review.

§ 421. In a former chapter we have treated somewhat cursorily of the several kinds of bills exhibited in Courts of Equity, and to that chapter the reader is referred,¹ as well as to the fourth chapter of this book, treating of bills necessary to render perfect a suit originally imperfect in its frame or become so since the institution of the original bill. We propose now to devote further sections especially to the consideration of bills of interpleader, bills to perpetuate testimony, bills to examine witnesses *de bene esse*, bills of discovery, cross bills, and bills of review, as being of frequent occurrence in the proceedings in Equity Courts.

Bills of interpleader.

§ 422. COURSE OF PLAINTIFF.—A bill of interpleader is where the complainant claims no relief against either of the defendants, but the defendants claiming of him the same debt or duty by different or separate interests, he is uncertain with which of the claims he ought to comply, and applies to the court by this bill for leave to pay the money or deliver the property to the

¹ Book I. chap. II.

one to whom it of right belongs, and that he may thereafter be protected from the claims of both.² The object of this bill is to protect a complainant standing in the nature of an innocent stake-holder, and it will not lie if the plaintiff himself claims any interest in the property in dispute;³ nor will it lie if the complainant is obliged to admit that, as to either of the defendants, he is a wrong-doer.⁴

§ 423. To maintain a bill of interpleader, the complainant must be uncertain to whom the right belongs: and if the complainant shews no right to compel the defendants to interplead, whatever rights they may claim, each defendant may demur.⁵

§ 424. The matter of the bill should conform to the above requisitions: it should shew that the complainant is a mere stake-holder, having no personal interest in the controversy between the parties claiming the funds in his hands, and that their respective claims against him are of the same nature and character; that there is some doubt, in point of fact, to which claimant the debt or duty belongs, so that he cannot safely pay or render it to one without risk of being made liable for the same debt or duty to the other.⁶

§ 425. To a bill of interpleader, it is necessary to annex an affidavit by the complainant, to the effect that there is no collusion between him and any of the other parties.⁷ The want of this affidavit is a cause of demurrer.⁸

² Welf. Eq. Pl. 148.

³ IL. Barb. Ch. Pr. 117, 118.

⁴ Ibid.

⁵ Welf. Eq. Pl. 152, '3.

⁶ IL. Barb. Ch. Pr. 120.

⁷ Ibid.

⁸ Mitf. Pl. See Story's Eq. Pl. 297.

§ 426. The prayer of the bill conforms to the objects for which it is instituted; it prays that the defendants may set forth their several titles, and may interplead and settle and adjust their demands between themselves;⁹ that the court will adjudge to whom the money or property belongs, and that the complainant may be indemnified: and if any suits at law are brought against the complainant, the bill may pray for an injunction to restrain the claimants from proceeding until the right is determined;¹⁰ but, in general, the money must be brought into court before the court will act on this part of the prayer.¹¹

§ 427. *Defence*.—If the bill does not show a right to compel the defendants to interplead, a demurrer lies; and so, too, the bill may be demurred to, as we have seen, if there be not annexed to it an affidavit of non-collusion.¹²

§ 428. The defendants may also put in an answer admitting or denying the facts stated in the bill.¹³

Bills to perpetuate testimony.

§ 429. A bill to perpetuate testimony may be brought when a party interested in any property is in danger of losing the evidence of his right before it can be judicially investigated.¹⁴

§ 430. To such bills, the persons who will be benefited by the loss of the evidence will be made parties defendant, and the prayer of the bill will be to examine the witnesses and perpetuate the testimony.¹⁵

⁹ Story's Eq. Pl. 297.

¹⁰ II. Barb. Ch. Pr. 122.

¹¹ Story's Eq. Pl. 297.

¹² II. Barb. Ch. Pr. 122.

¹³ II. Barb. Ch. Pr. 123.

¹⁴ II. Barb. Ch. Pr. 136.

¹⁵ II. Barb. Ch. Pr. 136. See sections 433, 4, *post*.

§ 431. The rule of most utility in regard to such bills is this—that the party complainant must be interested; and a mere expectancy, however strong, will not be sufficient to support the bill;¹⁶ but any actual interest, be it small or great in value, whether absolute or contingent, and although remote in enjoyment, is sufficient.¹⁷

§ 432. The bill should state particularly the matter touching which the complainant is desirous of acquiring evidence; that the complainant has an interest in the subject; the nature of the interest; and the interest of the parties defendant to contest the complainant's title;¹⁸ and when the bill is framed on the ground that the testimony of a witness may be lost by his death or departure from the State before the case can be investigated in the Court of Law, it seems proper also, in order to avoid objection, to annex to it an affidavit of the circumstances by which the evidence intended to be perpetuated is in danger of being lost.¹⁹ When the bill is sworn to, however, it will be sufficient to state the circumstances in the bill: no other affidavit will be necessary.²⁰

§ 433. The bill should, as we have stated, pray leave to examine witnesses touching the matters stated, to the end that their testimony may be preserved and perpetuated.²¹ It should also pray proper process; but it should not pray that the defendant may abide such

¹⁶ II. Barb. Ch. Pr. 137.

¹⁷ Ibid.

¹⁸ II. Barb. Ch. Pr. 140.

¹⁹ Ibid. 141.

²⁰ Ibid.

²¹ See section 430, *ante*.

order and decree as the court shall think proper to make, for that will turn it into a bill for relief, which is inconsistent with the nature of a bill to perpetuate testimony.²³

§ 434. *Defence.* The defence to a bill to perpetuate testimony is the same as in other cases, by demurrer, plea or answer, according to the nature of the case.²³ A demurrer will seldom lie to a bill of this nature; if the bill pray relief, it will of course be demurrable; but it has been held that where the relief and discovery prayed by the bill were both demurrable, the defendant could not demur to so much of the bill as sought to perpetuate testimony.²⁴

§ 435. "A bill to perpetuate testimony," says an authority before cited, "is never brought to a hearing."²⁵

§ 436. In the Virginia State Courts, bills to perpetuate testimony are of very rare occurrence, and, indeed, they have been rendered of no utility by the late legislation of the State. The statutes of this State have for a long period provided in the amplest manner for taking testimony in all pending cases, and by the

²³ II. Barb. Ch. Pr. 142. Coop. Eq. Pl. 52. *Miller v. Sharp*, 3 Rand. 41. But when a bill is to perpetuate testimony, and also for relief, the court will frequently allow the complainant to amend his bill by striking out the relief, even after the testimony has been taken under it. *Vaughan v. Fitzgerald*, 1 Sch. & Lef. 316, cited by Barbour. See II. Barb. Ch. Pr. 142.

²³ Welf. Eq. Pl. 146.

²⁴ II. Barb. Ch. Pr. 142.

²⁵ See *Vaughan v. Fitzgerald*, 1 Sch. & Lef. 316. Also, II. Barb. Ch. Pr. 143.

recent Code, special provision is made for the perpetuation of testimony as to matters in respect to which there is no suit.²⁶

Bill to examine witnesses de bene esse.

§ 437. This bill bears a close analogy to bills to perpetuate testimony. It is only sustainable in aid of a suit already depending, in this respect differing from the bill to perpetuate testimony, which may be maintained, as we have seen, when there is no present suit, and when no such suit can be brought by the person seeking the aid of the Court.²⁷

§ 438. The object of the bill is to take the testimony of witnesses for a trial at law, in cases where the testimony may otherwise be lost; as where the witnesses are aged or infirm, or are about to depart from the State.²⁸

§ 439. Depositions taken *de bene esse* are valid only in the cause in which they are taken, and against those who are parties to it and claiming through some or one of those whose interest has accrued since the bill was filed.²⁹

§ 440. The rules already stated in regard to bills to perpetuate testimony, are for the most part applicable to bills to take testimony *de bene esse*.

§ 441. Both in the Virginia State Courts and in the United States Circuit Courts, these bills have gone out of use. The statutory legislation of Virginia and of

²⁶ See Code of Virginia, chap. 176, sec. 34; also, sections 26, 27, 28, 29, 30, 31, 32 and 33 of same chapter.

²⁷ IL. Barb. Ch. Pr. 144.

²⁸ Ibid. 145.

²⁹ Ibid.

the Congress of the United States, and the rules of the United States Supreme Court, have entirely obviated the necessity of filing such bills.³⁰

Bills of discovery.

§ 442. Every bill is in reality a bill of discovery; but the kind of bill usually distinguished by that title is a bill for the discovery of facts resting in the knowledge of the defendant, or of deeds, or writings, or other things in his custody and power, and seeking no relief in consequence of the discovery, though it may pray for a stay of the proceedings at law until the discovery shall be made. It is commonly used in aid of the jurisdiction of some other court.³¹

§ 443. The complainant must be entitled to the discovery he seeks, and can only have a discovery of what is necessary for his own title, and will not be allowed to pry into that of the defendant.³²

§ 444. A discovery will not be compelled where it would subject the defendant to a penalty, forfeiture, or criminal proceedings, or would be in violation of professional confidence.³³

§ 445. A bill of discovery must be for matters which lie only in the knowledge of the defendant, and must call for something which it is not in the power of the complainant to set out in his bill.³⁴

³⁰ See Code of Virginia, chap. 176, sec. 31. Story's Laws U. S. Vol. I. p. 64. LXX. Rule Supreme Court U. S.; and chapter on "Evidence," *ante*.

³¹ Mitf. Eq. Pl. 53. II. Barb. Ch. Pr. 101.

³² Cooper's Eq. Pl. 58. II. Barb. Ch. Pr. 101.

³³ Welf. Eq. Pl. 119. Story's Eq. Pl. s. 547.

³⁴ II. Barb. Ch. Pr. 103.

§ 446. The bill should state the matter concerning which a discovery is sought, the interest of the several parties in the subject, and the complainant's right to the discovery asked for. It must shew a privity between the complainant and defendant, and state with reasonable certainty its true nature and character.³⁵ It must also state that the discovery is asked for the purpose of some suit brought or intended to be brought;³⁶ and when the bill is brought, before any action is commenced, it is usual to aver that the discovery of the facts is necessary to enable the party to commence his suit aright.³⁷

§ 447. The prayer of the bill is usually to the effect that the complainant may have of the defendant "a full disclosure and discovery of all and every the matters and things" stated before, and that "the defendant may abide the order and *direction*³⁸ of the court." It seems that if any exercise of the jurisdiction of the court is prayed which involves the necessity of a hearing and decree or decretal order, on these rights, the suit is thereby rendered a suit for relief, and is liable to all the incidents of that proceeding.³⁹

§ 448. *Defence.* To a bill of discovery, a defendant may either plead, answer or demur. If the matter relied on by the defendant constitutes a defence to the relief or purpose sought by the bill, whether that relief be at law or in equity; or if the defence be that the

³⁵ II. Barb. Ch. Pr. 104.

³⁶ Ibid. 105.

³⁷ Ibid.

³⁸ Observe, that the "*decree*" of the court is not prayed for: but if it were, if there be no prayer for relief, the bill will be considered as a bill for discovery merely. See II. Barb. Ch. Pr. 107, and cases there cited.

³⁹ II. Barb. Ch. Pr. 107.

complainant has no title to equitable relief; or that the complainant has no interest in the subject matter; or that the defendant is a *bona fide* purchaser for a valuable consideration, without notice; or that the bill does not declare a purpose for which courts of equity will compel a discovery; or that the complainant is under some disability: in these and the like cases, though the defence extends to the entire subject of the suit, it seems that the objection must be taken by way of plea or demurrer: and it is a general rule that unless the defendant can protect himself by demurrer or plea, according to the nature of the case, he must answer.⁴⁰

§ 449. As soon as the answer is filed, containing the discovery, the purposes of the suit are accomplished, and the suit is not brought to a hearing. The defendant in such case is entitled to his costs.⁴¹

§ 450. In the Virginia State Courts, bills of discovery are rarely, if ever, filed. The statutes of the State have made ample provision for obtaining discoveries from parties to actions at law, without resorting to a Court of Equity.⁴²

Cross bills.

§ 451. In a previous chapter, we have stated that it was necessary for the full protection of defendants in certain cases, that a cross bill should be filed.⁴³ As a defendant cannot pray any thing in his answer except

⁴⁰ II. Barb Ch. Pr. 109.

⁴¹ Ibid. 115. Coop. Pl. 61.

⁴² See Code of Virginia, chap. 176, sec. 38, 39 and 40.

⁴³ See section 176, *ante*.

to be dismissed the court, if he has any relief to pray or discovery to seek, he must do so by a bill of his own, which is called a cross-bill.⁴⁴

§ 452. A cross bill may be brought either to obtain a discovery of facts in aid of the defence to the original bill, or to obtain some relief founded on the collateral claims of the party filing it.⁴⁵

§ 453. The necessity of a cross bill for discovery, arises from the general rule in equity that the complainant in a suit cannot be examined as a witness in that suit. There are not unfrequently cases in which the particular transaction is known only to the acting parties. In these, the cross bill affords a perfect reciprocity of proof to each party, derived from the answers of each.⁴⁶

§ 454. Sometimes a cross bill is resorted to by the defendant, when by the rules of pleading in equity he would not otherwise be able to avail himself of the matter of his defence. Thus, if the defence has arisen after the cause is at issue, or if the complainant has released the defendant, or there has been an award made on a reference after issue joined, a defendant may bring them before the court on a cross bill.⁴⁷ A cross bill is also necessary to enable a defendant to have a decree against a co-defendant.⁴⁸

§ 455. The connection of the matter of a cross bill (in itself either legal or equitable) with the subject

⁴⁴ Lube's Eq. Pl. 39. II. Barb. Ch. Pr. 126.

⁴⁵ II. Barb. Ch. Pr. 127. Story's Eq. Pl. s. 389.

⁴⁶ Story's Eq. Pl. s. 390. II. Barb. Ch. Pr. 127.

⁴⁷ Cooper's Eq. Pl. 86, 87. Mitf. Pl. 82.

⁴⁸ Mitf. Pl. 81.

matter of the original bill, gives the court jurisdiction of the cross bill, of which it cannot be ousted by a dismissal of the original bill.⁴⁹

§ 456. A cross bill should state the original bill and proceedings thereon, and the rights of the party exhibiting the bill which are necessary to be made the subject of cross legislation, or the ground on which he resists the claims of the plaintiff in the original bill, if that is the object of the new bill.⁵⁰ In a cross bill, a party cannot question what he has admitted in his answer.⁵¹

§ 457. A cross bill filed for collateral relief differs in no respect from the common form of an original bill.⁵²

§ 458. *Defence.* A complainant in the original bill, as well as other parties to the cross bill, may plead, answer or demur to the cross bill; but a plea to the person of the complainant in a cross bill, (unless exhibited by a person incapable alone to institute a suit,) and a demurrer for want of equity in such bill, will not lie.⁵³ Nor does a plea to the jurisdiction lie to such bill.⁵⁴

§ 459. A complainant in the original bill has the priority, and will not be compelled to answer the cross

⁴⁹ Barb. Ch. Pr. 128. *Wickliffe v. Clay*, 1 Dana, 589.

⁵⁰ Mitf. Pl. 81.

⁵¹ *Hudsons, &c. v. Hudson's ex'rs.*, 3 Rand. 177

⁵² II. Barb. Ch. Pr. 132.

⁵³ Mitf. Eq. Pl. 291. II. Barb. Ch. Pr. 132, 133.

⁵⁴ Mitf. Eq. Pl. 291. Though the authorities do not so state, it is presumed that the complainant alone in original bill is precluded from making these defences. We see no reason why others should be debarred from making them, in cases in which such defences were made to original bill. See Mitf. Eq. Pl. 203, as to reason of rule announced in the text.

bill until the defendant has put in his answer to the original bill;⁵⁵ but if the plaintiff in the original cause amends his bill in material points, subsequent to the filing of the cross bill, the amended bill will be considered as a new bill, and he thereby loses his priority.⁵⁶

§ 460. If a cross bill be taken as confessed, it may be used as evidence against the complainant in the original suit, on the hearing, and will have the same effect as if he had admitted the same facts in an answer.⁵⁷

§ 461. After both causes are at issue, the complainant in the cross suit may have an order that they be heard together, but it is not indispensable that they be heard together.⁵⁸ The court will not suspend the hearing of the original cause on account of a cross bill, when the cross bill has been filed at an unreasonably late period, or when the plaintiff in the cross bill has practiced delay in preparing it for a hearing.⁵⁹

§ 462. Sometimes, at the hearing of an original cause, a cross bill is directed to be filed; and even after interlocutory decree, such direction has been given.⁶⁰

⁵⁵ Lube's Eq. Pl. 143. See Code of Virginia, chap. 171, sec. 15; also, LXXII. Rule Supreme Court U. S., printed in Appendix to this volume.

⁵⁶ Lube's Eq. Pl. 143. If an original bill is abated by the marriage of a complainant, and a cross bill is then filed, the priority of the original bill is lost. *Smart v. Floyer*, Dick. 260, cited by Barbour: II. Barb. Ch. Pr. 135.

⁵⁷ *White v. Buloid*, 2 Paige, 164. II. Barb. Ch. Pr. 135.

⁵⁸ *Coleman v. Moore*, 3 Little, 355.

⁵⁹ See II. Rob. Pr. 319, and the following cases cited by Robinson: *Sterry, &c. v. Arden, &c.*, 1 Johns. Ch. Rep. 62; *Gouverneur, &c. v. Elmen-dorf, &c.*, 4 Johns. Ch. Rep. 357; and *White v. Buloid*, 2 Paige, 164.

⁶⁰ See Mitf. Pl. 83; *Brown v. Story*, 2 Paige, 594.

Bills of review.

§ 463. A bill of review is in the nature of a writ of error; and its object is to procure an examination and alteration, or reversal of a final decree made upon a former bill.⁶¹ Such a bill may be filed by either plaintiff or defendant.⁶²

§ 464. The causes for which a bill of review may be maintained are limited to these: 1st. There must be error in law apparent upon the face of the decree; or, 2d. The plaintiff must allege and prove the discovery of new matter which could not have been used at the time of making the decree, in consequence of the party's ignorance that such matter existed.

§ 465. When the bill of review is not founded on error apparent on the decree, according to the English practice, leave should be first obtained to file it; and leave is obtained on a petition. This practice prevails in the United States Circuit Courts.⁶³ In the Virginia State Courts, whatever may be the occasion of the bill, leave may be obtained to file it upon a simple motion.⁶⁴

§ 466. When the bill of review professes to be founded on newly discovered evidence, it should be accompanied by an affidavit to the effect that such evidence has been discovered since the decree, and

⁶¹ See II. Barb. Ch. Pr. 90.

⁶² See *Osborne v. Usher*, 6 Bro. P. C. Tom. ed. 20, cited by Barbour, II. Barb. Ch. Pr. 96. *Thornton v. Stewart*, 7 Leigh, 128.

⁶³ See *Dexter v. Arnold*, 5 Mason's C. C. R. 303.

⁶⁴ See *Lee's infants v. Braxton*, 5 Call, 459; *Williamson v. Ledbetter, &c.*, 2 Munf. 521; *Quarrier v. Carter's representatives*, 4 H. & M. 243.

could not have been used at the time of the decree in consequence of the party's ignorance that such matter existed.⁶⁵

§ 467. After the affirmance of a decree by the Court of Appeals, (the highest appellate court in the State,) a bill of review founded merely on error in the decree, which is apparent on the face of the record, will not be received in the Virginia State Courts;⁶⁶ and this rule is so obviously right, that in the absence of decision on the point by the United States Supreme Court, it may be affirmed with safety that the like practice will prevail in the United States Circuit Courts.

§ 468. In the Virginia State Courts, a bill of review must be exhibited within three years after the final decree sought to be reviewed;⁶⁷ and the fact that it is so exhibited should appear on the face of the bill.⁶⁸ An exception, however, to this rule, is made in favor of infants, married women and lunatics, who are allowed three years after the removal of their disability to file a bill of review. In the United States Circuit Courts, by analogy to the time allowed for appealing from a decree, parties are usually allowed five years after the rendition of a final decree in which to file a bill of review;⁶⁹ but it is within the discretion of these courts to permit the filing of a bill of review after this period.⁷⁰

⁶⁵ *Barnett & Co. v. Smith & Co.*, 5 Call, 102. *Quære.* Is this affidavit necessary when a petition has been previously filed, accompanied by such an affidavit?

⁶⁶ *Campbell v. Price, &c.*, 3 Munf. 227. See also Chancellor Taylor's opinion in *McCall v. Graham, &c.*, 1 H. & M. 13.

⁶⁷ Code of Virginia, chap. 179, sec. 5. ⁶⁸ *Ibid.*

⁶⁹ See *Thomas v. Harvie's heirs*, 10 Wheat. 150; also, Story's Laws U. S., II. vol. p. 905.

⁷⁰ See *Thomas v. Harvie's heirs*, 10 Wheat. 150.

§ 469. The Code of Virginia, ruling the practice in Virginia State Courts, enacts that a court or judge allowing a bill of review may award an injunction to the decree to be reviewed.⁷¹

§ 470. All the parties to the original bill ought to be made parties to the bill of review, for it is a principle of natural justice that no one ought to be affected by any decree without his first being heard.⁷²

§ 471. In a bill of review, it is necessary to state the former bill and the proceedings thereon; the decree and the point in which the complainant conceives himself aggrieved by it; and the ground of law or new matter discovered upon which he seeks to impeach it;⁷³ and, as we have already stated, when such bill is exhibited in the Virginia State Courts, it must shew on its face that it has been exhibited in proper time.⁷⁴

§ 472. The bill may pray simply that the decree may be reviewed, and altered or reversed, in the point complained of, if it has not been carried into execution; but if the decree has been carried into execution, the bill should also pray the further decree of the court, to put the party complaining of the former decree into the situation in which he would have been if the decree had not been executed.⁷⁵

§ 473. *Defence.* To a bill of review founded upon alleged errors apparent on the decree, the usual mode

⁷¹ Code of Virginia, chap. 179, sec. 5.

⁷² II. Barb. Ch. Pr. 94. Story's Eq. Pl. 420. Cooper's Eq. Pl. 95.

⁷³ Mitf. Pl. 88. II. Barb. Ch. Pr. 97. See also, Cooper's Eq. Pl. 95.

⁷⁴ See section 468, *ante*.

⁷⁵ Mitf. Pl. 89.

of defence is to plead the former decree in bar of the suit, and to object by demurrer to its being opened, alleging, as a ground of demurrer, that there is no error.⁷⁶

§ 474. The defendant may also demur alone, or answer;⁷⁷ but it is laid down in the English books that a bill of review upon the discovery of new matter is seldom liable to demurrer, for being exhibited only by leave of the court, the ground of the bill is generally well considered before it is brought.⁷⁸ This rule is applicable wherever such prior leave to file the bill is required; and the court, before allowing it to be filed, narrowly inspects its contents and weighs its merits: yet it seems a demurrer will lie to a bill of review *for* new matter not relevant, even though its relevancy should have been considered when leave was given to file the bill.⁷⁹

§ 475. An answer is rarely filed, save when the bill alleges the discovery of new matter. Then, an answer may be put in, controverting the fact that the matter is newly discovered and alleging other matter which may rebut the force of such newly discovered matter. In the case of a bill of review, there is no farther restriction upon the defendant as regards his answer, than there would be if he were called on to answer an ordinary original bill.

⁷⁶ Coop. Eq. Pl. 96. II. Barb. Ch. Pr. 98.

⁷⁷ See Mitf. 205.

⁷⁸ Mitf. Pl. 205.

⁷⁹ 2 Atk. 40. II. Barb. Ch. Pr. 99.



APPENDIX.



APPENDIX.

I.

Rules of Practice in Suits in Equity, adopted by the Supreme Court of the United States on the 2nd March, 1842, for the use of the United States Circuit Courts.

PRELIMINARY REGULATIONS.

I. The circuit courts, as courts of equity, shall be deemed always open for the purpose of filing bills, answers and other pleadings, for issuing and returning mesne and final process and commissions, and for making and directing all interlocutory motions, orders, rules, and other proceedings, preparatory to the hearing of all causes upon their merits.

II. The clerk's office shall be open, and the clerk shall be in attendance therein on the first Monday of every month, for the purpose of receiving, entering, entertaining and disposing of all motions, rules, orders, and other proceedings, which are grantable of course and applied for, or had by the parties, or their solicitors in all causes pending in equity, in pursuance of the rules hereby prescribed.

III. Any judge of the circuit court, as well in vacation as in term, may, at chambers, or on the rule days, at the clerk's office, make and direct all such interlocutory orders, rules and other proceedings, preparatory to the hearing of all causes

upon their merits, in the same manner and with the same effect as the circuit court could make and direct the same in term, reasonable notice of the application therefor being first given to the adverse party, or his solicitor, to appear and show cause to the contrary at the next rule day thereafter, unless some other time is assigned by the judge for the hearing.

IV. All motions, rules, orders and other proceedings made and directed at chambers, or on rule day at the clerk's office, whether special or of course, shall be entered by the clerk in an order book, to be kept at the clerk's office on the day when they are made and directed—which book shall be open at all office hours, to the free inspection of the parties in any suit in equity, and their solicitors. And except in cases where personal or other notice is specially required or directed, such entry in the order book shall be deemed sufficient notice to the parties and their solicitors, without further service thereof, of all orders, rules, acts, notices and other proceedings entered in such order book, touching any and all the matters in the suits, to and in which they are parties and solicitors. And notice to the solicitors shall be deemed notice to the parties for whom they appear and whom they represent, in all cases where personal notice on the parties is not otherwise specially required. Where the solicitors for all the parties in a suit reside in or near the same town or city, the judges of the circuit court may, by rule, abridge the time for notice of rules, orders or other proceedings, not requiring personal service on the parties, in their discretion.

V. All motions and applications in the clerk's office for the issuing of mesne process and final process to enforce and execute decrees, for filing bills, answers, pleas, demurrers and other pleadings; for making amendments to bills and answers; for taking bills pro confesso; for filing exceptions, and for other proceedings in the clerk's office, which do not by the rules hereinafter prescribed, require any allowance or order of the court, or of any judge thereof, shall be deemed motions and applications, grantable of course by the clerk of the court. But the same may be suspended, or altered, or rescinded by any judge of the court, upon special cause shown.

VI. All motions for rules or orders and other proceedings, which are not grantable of course, or without notice, shall, unless a different time be assigned by a judge of the court, be

made on a rule day, and entered in the order book, and shall be heard at the rule day next after that on which the motion is made. And if the adverse party, or his solicitor, shall not then appear, or shall not show good cause against the same, the motion may be heard by any judge of the court *ex parte*, and granted, as if not objected to, or refused, in his discretion.

PROCESS.

VII. The process of subpoena shall constitute the proper mesne process in all suits in equity, in the first instance, to require the defendant to appear and answer the exigency of the bill; and unless otherwise provided in these rules, or specially ordered by the circuit court, a writ of attachment, and if the defendant cannot be found, a writ of sequestration, or a writ of assistance to enforce a delivery of possession, as the case may require, shall be the proper process to issue for the purpose of compelling obedience to any interlocutory or final order or decree of the court.

VIII. Final process to execute any decree may, if the decree be solely for the payment of money, be by a writ of execution, in the form used in the circuit court in suits at common law in actions of assumpsit. If the decree be for the performance of any specific act, as, for example, for the execution of a conveyance of land, or the delivering up of deeds, or other documents, the decree shall, in all cases, prescribe the time within which the act shall be done, of which the defendant shall be bound without further service to take notice; and upon affidavit of the plaintiff, filed in the clerk's office, that the same has not been complied with within the prescribed time, the clerk shall issue a writ of attachment against the delinquent party, from which, if attached thereon, he shall not be discharged, unless upon a full compliance with the decree and the payment of all costs, or upon a special order of the court or of a judge thereof, upon motion and affidavit, enlarging the time for the performance thereof. If the delinquent party cannot be found, a writ of sequestration shall issue against his estate upon the return of *non est inventus*, to compel obedience to the decree.

IX. When any decree or order is for the delivery of possession, upon proof made by affidavit of a demand and refusal to obey the decree or order, the party prosecuting the same shall be entitled to a writ of assistance from the clerk of the court.

X. Every person, not being a party in any cause, who has obtained an order, or in whose favor an order shall have been made, shall be enabled to enforce obedience to such order by the same process, as if he were a party to the cause; and every person, not being a party in any cause, against whom obedience to any order of the court may be enforced, shall be liable to the same process for enforcing obedience to such order, as if he were a party in the cause.

SERVICE OF PROCESS.

XI. No process of subpoena shall issue from the clerk's office in any suit in equity, until the bill is filed in the office.

XII. Whenever a bill is filed, the clerk shall issue the process of subpoena thereon, as of course, upon the application of the plaintiff, which shall be returnable into the clerk's office the next rule day, or the next rule day but one, at the election of the plaintiff, occurring after twenty days from the time of the issuing thereof. At the bottom of the subpoena shall be placed a memorandum, that the defendant is to enter his appearance in the suit in the clerk's office, on or before the day, at which the writ is returnable; otherwise, the bill may be taken *pro confesso*. Where there are more than one defendants, a writ of subpoena may, at the election of the plaintiff, be sued out separately for each defendant, except in the case of husband and wife, defendants, or a joint subpoena against all the defendants.

XIII. The service of all subpoenas shall be by delivery of a copy thereof by the officer serving the same, to the defendant personally, or, in case of husband and wife, to the husband personally, or by leaving a copy thereof at the dwelling house or usual place of abode of each defendant, with some free white person, who is a member or resident in the family.

XIV. Whenever any subpoena shall be returned not executed as to any defendant, the plaintiff shall be entitled to another subpoena, toties quoties, against such defendant, if he shall require it, until due service is made.

XV. The service of all process, mesne and final, shall be by the marshal of the district, or his deputy, or by some other person specially appointed by the Court for that purpose, and not otherwise; in the latter case, the person serving the process shall make affidavit thereof.

XVI. Upon the return of the subpoena, as served and executed upon any defendant, the clerk shall enter the suit upon his docket as pending in the court and shall state the time of the entry.

APPEARANCE.

XVII. The appearance day of the defendant shall be the rule day, to which the subpoena is made returnable; provided he has been served with the process twenty days before that day; otherwise, his appearance day shall be the next rule day succeeding the rule day when the process is returnable.

The appearance of the defendant, either personally or by his solicitor, shall be entered in the order book on the day thereof by the clerk.

BILLS TAKEN PRO CONFESSO.

XVIII. It shall be the duty of the defendant, unless the time shall be otherwise enlarged, for cause shown, by a judge of the court upon motion for that purpose, to file his plea, demurrer, or answer to the bill in the clerk's office, on the rule day next succeeding that of entering his appearance: in default thereof, the plaintiff may, at his election, enter an order (as of course) in the order book, that the bill be taken pro confesso; and thereupon the cause shall be proceeded in ex parte, and the matter of the bill may be decreed by the court at the next ensuing term thereof accordingly, if the same can be done without an answer, and is proper to be decreed; or the plaintiff, if he requires any discovery or answer to enable him to obtain a proper decree, shall be entitled to process of attachment against the defendant, to compel an answer; and the defendant shall not, when arrested upon such process, be discharged therefrom, unless, upon filing his answer, or otherwise complying with such order, as the court or a judge thereof may direct, as to pleading to, or fully answering the bill, within a period to be fixed by the court or judge, and undertaking to speed the cause.

XIX. When the bill is taken pro confesso, the court may proceed to a decree at the next ensuing term thereof, and such decree rendered shall be deemed absolute, unless the court shall, at the same term, set aside the same, or enlarge the time for filing the answer, upon cause shown upon motion and affidavit of the defendant. And no such motion shall be granted, unless upon the payment of the costs of the

plaintiff in the suit up to that time, or such part thereof as the court shall deem reasonable, and unless the defendant shall undertake to file his answer within such time as the court shall direct, and submit to such other terms as the court shall direct, for the purpose of speeding the cause.

FRAME OF BILLS.

XX. Every bill, in the introductory part thereof, shall contain the names, places of abode, and citizenship, of all the parties, plaintiffs, and defendants, by and against whom the bill is brought. The form, in substance, shall be as follows: "To the Judges of the Circuit Court of the United States for the District of —. A. B., of —, and a citizen of the State of —, brings this his bill against C. D., of —, and a citizen of the State of —, and E. F., of —, and a citizen of the State of —. And thereupon your orator complains and says, that, &c."

XXI. The plaintiff, in his bill, shall be at liberty to omit, at his option, the part, which is usually called the common confederacy clause of the bill, averring a confederacy between the defendants to injure or defraud the plaintiff; also what is commonly called the charging part of the bill, setting forth the matters or excuses, which the defendant is supposed to intend to set up by way of defence to the bill; also, what is commonly called the jurisdiction clause of the bill, that the acts complained of are contrary to equity, and that the defendant is without any remedy at law; and the bill shall not be demurrable therefor. And the plaintiff may, in the narrative or stating part of his bill, state and avoid, by counter averments, at his option, any matter or thing, which he supposes will be insisted upon by the defendant, by way of defence or excuse, to the case made by the plaintiff for relief. The prayer of the bill shall ask the special relief, to which the plaintiff supposes himself entitled, and also shall contain a prayer for general relief; and if an injunction, or a writ of ne exeat regno, or any other special order pending the suit, is required, it shall also be specially asked for.

XXII. If any persons, other than those named as defendants in the bill, shall appear to be necessary or proper parties thereto, the bill shall aver the reason, why they are not made parties, by showing them to be without the jurisdiction of the court, or that they cannot be joined without ousting the jurisdiction of the court as to the other parties. And as to per-

sons who are without the jurisdiction, and may properly be made parties, the bill may pray, that process may issue to make them parties to the bill, if they should come within the jurisdiction.

XXIII. The prayer for process of subpoena in the bill shall contain the names of all the defendants named in the introductory part of the bill, and if any of them are known to be infants under age, or otherwise under guardianship, shall state the fact, so that the court may take order thereon as justice may require, upon the return of the process. If an injunction, or a writ of ne exeat regno, or any other special order pending the suit, is asked for in the prayer for relief, that shall be sufficient, without repeating the same in the prayer for process.

XXIV. Every bill shall contain the signature of counsel annexed to it, which shall be considered as an affirmation on his part, that upon the instructions given to him and the case laid before him, there is good ground for the suit, in the manner in which it is framed.

XXV. In order to prevent unnecessary costs and expenses, and to promote brevity, succinctness, and directness in the allegations of bills and answers, the regular taxable costs for every bill and answer shall in no case exceed the sum which is allowed in the state court of chancery in the district, if any there be; but if there be none, then it shall not exceed the sum of three dollars for every bill or answer,

SCANDAL AND IMPERTINENCE IN BILLS.

XXVI. Every bill shall be expressed in as brief and succinct terms as it reasonably can be, and shall contain no unnecessary recitals of deeds, documents, contracts, or other instruments, in hæc verba, or any other impertinent matter, or any scandalous matter not relevant to the suit. If it does, it may on exceptions be referred to a master, by any judge of the court, for impertinence, or scandal, and if so found by him, the matter shall be expunged at the expense of the plaintiff, and he shall pay to the defendant all his costs in the suit up to that time, unless the court, or a judge thereof shall otherwise order. If the master shall report, that the bill is not scandalous or impertinent, the defendant shall be entitled to all costs occasioned by the reference.

XXVII. No order shall be made by any judge for referring any bill, answer, or pleading, or other matter, or proceeding depending before the court for scandal or impertinence, unless exceptions are taken in writing and signed by counsel, describing the particular passages which are considered to be scandalous or impertinent; nor unless the exceptions shall be filed on or before the next rule day, after the process on the bill be returnable, or after the answer or pleading is filed. And such order, when obtained, shall be considered as abandoned, unless the party obtaining the order shall, without any unnecessary delay, procure the master to examine and report for the same on or before the next succeeding rule day, or the master shall certify that further time is necessary for him to complete the examination.

AMENDMENTS OF BILLS.

XXVIII. The plaintiff shall be at liberty, as a matter of course, and without payment of costs, to amend his bill in any matters whatsoever, before any copy has been taken out of the clerk's office, and in any small matters afterwards, such as filling blanks, correcting errors of dates, misnomer of parties, mis-description of premises, clerical errors, and generally in matters of form. But if he amend in a material point, (as he may do of course,) after a copy has been so taken, before any answer or plea, or demurrer to the bill, he shall pay to the defendant the costs occasioned thereby, and shall without delay furnish him a fair copy thereof, free of expense, with suitable references to the places where the same are to be inserted. And if the amendments are numerous, he shall furnish in like manner to the defendant, a copy of the whole bill as amended, and if there be more than one defendant, a copy shall be furnished to each defendant affected thereby.

XXIX. After an answer, or plea, or demurrer is put in, and before replication, the plaintiff may, upon motion or petition without notice, obtain an order from any judge of the court, to amend his bill on or before the next succeeding rule day, upon payment of costs or without payment of costs, as the court or a judge thereof may in his discretion direct. But after replication filed, the plaintiff shall not be permitted to withdraw it and to amend his bill, except upon a special order of a judge of the court, upon motion or petition, after due notice to the other party, and upon proof by affidavit that the same is not made for the purpose of vexation or

delay, or that the matter of the proposed amendment is material, and could not with reasonable diligence have been sooner introduced into the bill, and upon the plaintiff's submitting to such other terms as may be imposed by the judge for speeding the cause.

XXX. If the plaintiff, so obtaining any order to amend his bill after answer, or plea, or demurrer, or after replication, shall not file his amendments or amended bill, as the case may require, in the clerk's office, on or before the next succeeding rule day, he shall be considered to have abandoned the same, and the cause shall proceed as if no application for any amendment had been made.

DEMURRERS AND PLEAS.

XXXI. No demurrer or plea shall be allowed to be filed to any bill, unless upon a certificate of counsel, that in his opinion it is well founded in point of law, and supported by the affidavit of the defendant, that it is not interposed for delay; and if a plea, that it is true in point of fact.

XXXII. The defendant may, at any time before the bill is taken for confessed, or afterwards with the leave of the court, demur or plead to the whole bill, or to part of it, and he may demur to part, plead to part, and answer as to the residue; but in every case, in which the bill specially charges fraud or combination, a plea to such part must be accompanied with an answer fortifying the plea, and explicitly denying the fraud and combination, and the facts on which the charge is founded.

XXXIII. The plaintiff may set down the demurrer or plea to be argued, or he may take issue on the plea. If, upon an issue, the facts stated in the plea be determined for the defendant, they shall avail him, as far as in law and equity they ought to avail him.

XXXIV. If upon the hearing, any demurrer or plea is overruled, the plaintiff shall be entitled to his costs in the cause up to that period, unless the court shall be satisfied that the defendant had good ground in point of law or fact to interpose the same, and it was not interposed vexatiously or for delay. And upon the overruling of any plea or demurrer, the defendant shall be assigned to answer the bill, or so much thereof as is covered by the plea or demurrer, the next succeeding rule day, or at such other period as, consistently with

justice and the rights of the defendant; the same can, in the judgment of the court, be reasonably done; in default whereof, the bill shall be taken against him, *pro confesso*, and the matter thereof proceeded in and decreed accordingly.

XXXV. If, upon the hearing, any demurrer or plea shall be allowed, the defendant shall be entitled to his costs. But the court may, in its discretion, upon motion of the plaintiff, allow him to amend his bill upon such terms as it shall deem reasonable.

XXXVI. No demurrer or plea shall be held bad and overruled upon argument, only because such demurrer or plea shall not cover so much of the bill as it might by law have extended to.

XXXVII. No demurrer or plea shall be held bad and overruled upon argument, only because the answer of the defendant may extend to some part of the same matter, as may be covered by such demurrer or plea.

XXXVIII. If the plaintiff shall not reply to any plea, or set down any plea or demurrer for argument, on the rule day, when the same is filed, or on the next succeeding rule day, he shall be deemed to admit the truth and sufficiency thereof, and his bill shall be dismissed, as of course, unless a judge of the court shall allow him further time for the purpose.

ANSWERS.

XXXIX. The rule, that if a defendant submits to answer he shall answer fully to all the matters of the bill, shall no longer apply, in cases where he might by plea protect himself from such answer and discovery. And the defendant shall be entitled in all cases by answer to insist upon all matters of defence (not being matters of abatement, or to the character of the parties, or matters of form) in bar of or to the merits of the bill, of which he may be entitled to avail himself by a plea in bar; and in such answer he shall not be compellable to answer any other matters than he would be compellable to answer and discover upon filing a plea in bar, and an answer in support of such plea, touching the matters, set forth in the bill to avoid or repel the bar or defence. Thus, for example, a bona fide purchaser for a valuable consideration, without notice, may set up that defence by way of answer instead of plea, and shall be entitled to the same protection, and shall

not be compellable to make any further answer or discovery of his title than he would be in any answer in support of such plea.

XL. A defendant shall not be bound to answer any statement or charge in the bill, unless specially and particularly interrogated thereto; and a defendant shall not be bound to answer any interrogatory in the bill, except those interrogatories, which such defendant is required to answer; and where a defendant shall answer any statement or charge in the bill, to which he is not interrogated, only by stating his ignorance of the matter so stated or charged, such answer shall be deemed impertinent. [Repealed by XCIII. Rule, *post*.]

XLI. The interrogatories contained in the interrogating part of the bill shall be divided as conveniently as may be from each other, and numbered consecutively 1, 2, 3, &c.; and the interrogatories which each defendant is required to answer shall be specified in a note at the foot of the bill, in the form or to the effect following; that is to say,—“The defendant, (A. B.,) is required to answer the interrogatories numbered respectively 1, 2, 3,” &c.; and the office copy of the bill taken by each defendant shall not contain any interrogatories except those which such defendant is so required to answer, unless such defendant shall require to be furnished with a copy of the whole bill.

XLII. The note at the foot of the bill, specifying the interrogatories which each defendant is required to answer, shall be considered and treated as part of the bill, and the addition of any such note to the bill, or any alteration in or addition to such note after the bill is filed, shall be considered and treated as an amendment of the bill.

XLIII. Instead of the words of the bill now in use, preceeding the interrogating part thereof, and beginning with the words “To the end, therefore,” there shall hereafter be used words in the form or to the effect following: “To the end, therefore, that the said defendants may, if they can, show why your orator should not have the relief hereby prayed, and may, upon their several and respective corporal oaths, and according to the best and utmost of their several and respective knowledge, remembrance, information, and belief, full, true, direct and perfect answer make to such of the several interrogatories herein after numbered and set forth, as by the note

hereunder written, they are respectively required to answer; that is to say,—

“1. Whether, &c.

“2. Whether,” &c.

XLIV. A defendant shall be at liberty, by answer, to decline answering any interrogatory or part of an interrogatory, from answering which he might have protected himself by demurrer; and he shall be at liberty so to decline, notwithstanding he shall answer other parts of the bill, from which he might have protected himself by demurrer.

XLV. No special replication to any answer shall be filed. But if any matter alleged in the answer shall make it necessary for the plaintiff to amend his bill, he may have leave to amend the same with or without the payment of costs, as the court, or a judge thereof, may in his discretion direct.

XLVI. In every case where an amendment shall be made after answer filed, the defendant shall put in a new or supplemental answer, on or before the next succeeding rule day after that on which the amendment or amended bill is filed, unless the time therefor is enlarged or otherwise ordered by a judge of the court; and upon his default, the like proceedings may be had as in cases of an omission to put in an answer.

PARTIES TO BILLS.

XLVII. In all cases where it shall appear to the court that persons who might otherwise be deemed necessary or proper parties to the suit, cannot be made parties by reason of their being out of the jurisdiction of the court, or incapable otherwise of being made parties, or because their joinder would oust the jurisdiction of the court as to the parties before the court, the court may in their discretion proceed in the cause without making such persons parties; and in such cases the decree shall be without prejudice to the rights of the absent parties.

XLVIII. Where the parties on either side are very numerous, and cannot, without manifest inconvenience and oppressive delays in the suit, be all brought before it, the court in its discretion may dispense with making all of them parties, and may proceed in the suit, having sufficient parties before it to represent all the adverse interests of the plaintiffs and defendants in the suit properly before it. But in such cases

the decree shall be without prejudice to the rights and claims of all the absent parties.

XLIX. In all suits concerning real estate, which is vested in trustees by devise, and such trustees are competent to sell and give discharges for the proceeds of the sale, and for the rents and profits of the estate, such trustees shall represent the persons beneficially interested in the estate or the proceeds, or the rents and profits, in the same manner, and to the same extent, as the executors or administrators in suits concerning personal estate represent the persons beneficially interested in such personal estate; and in such cases it shall not be necessary to make the persons beneficially interested in such real estate, or rents and profits, parties to the suit; but the court may, upon consideration of the matter on the hearing, if it shall so think fit, order such persons to be made parties.

L. In suits to execute the trusts of a will, it shall not be necessary to make the heir at law a party; but the plaintiff shall be at liberty to make the heir at law a party, where he desires to have the will established against him.

LI. In all cases in which the plaintiff has a joint and several demand against several persons, either as principals or sureties, it shall not be necessary to bring before the court, as parties to a suit concerning such demand, all the persons liable thereto; but the plaintiff may proceed against one or more of the persons severally liable.

LII. Where the defendant shall, by his answer, suggest that the bill is defective for want of parties, the plaintiff shall be at liberty, within fourteen days after answer filed, to set down the cause for argument upon that objection only; and the purpose for which the same is so set down shall be notified by an entry, to be made in the clerk's order book, in the form or to the effect following; (that is to say,) "Set down upon the defendant's objection for want of parties." And where the plaintiff shall not so set down his cause, but shall proceed therewith to a hearing, notwithstanding an objection for want of parties taken by the answer, he shall not, at the hearing of the cause, if the defendant's objection shall then be allowed, be entitled as of course, to an order for liberty to amend his bill by adding parties. But the court, if it thinks fit, shall be at liberty to dismiss the bill.

RULES OF PRACTICE.

LIII. If a defendant shall, at the hearing of a cause, object, that a suit is defective for want of parties, not having by plea or answer taken the objection, and therein specified by name or description the parties to whom the objection applies, the court (if it shall think fit) shall be at liberty to make a decree saving the rights of the absent parties.

NOMINAL PARTIES TO BILLS.

LIV. Where no account, payment, conveyance, or other direct relief is sought against a party to a suit, not being an infant, the party, upon service of the subpoena upon him, need not appear and answer the bill, unless the plaintiff specially requires him to do so by the prayer of his bill; but he may appear and answer at his option; and if he does not appear and answer, he shall be bound by all the proceedings in the cause. If the plaintiff shall require him to appear and answer, he shall be entitled to the costs of all the proceedings against him, unless the court shall otherwise direct.

LV. Whenever an injunction is asked for by the bill to stay proceedings at law, if the defendant do not enter his appearance and plead, demur, or answer the same within the time prescribed therefor by these rules, the plaintiff shall be entitled as of course, upon motion without notice, to such injunction. But special injunctions shall be grantable only upon due notice to the other party by the court in term, or by a judge thereof in vacation, after a hearing, which may be *ex parte*, if the adverse party does not appear at the time and place ordered. In every case where an injunction, either the common injunction or a special injunction, is awarded in vacation, it shall, unless previously dissolved by the judge granting the same, continue until the next term of the court, or until it is dissolved by some other order of the court.

BILLS OF REVIVOR AND SUPPLEMENTAL BILLS.

LVI. Whenever a suit in equity shall become abated by the death of either party, or by any other event, the same may be revived by a bill of revivor, or a bill in the nature of a bill of revivor, as the circumstances of the case may require, filed by the proper parties entitled to revive the same; which bill may be filed in the clerk's office at any time; and upon suggestion of the facts the proper process of subpoena shall, as of course, be issued by the clerk, requiring the proper representatives of the other party to appear and show

cause, if any they have, why the cause should not be revived. And if no cause shall be shown at the next rule day, which shall occur after fourteen days from the time of the service of the same process, the suit shall stand revived, as of course.

LVII. Whenever any suit in equity shall become defective, from any event happening after the filing of the bill (as, for example, by a change of interest in the parties,) or for any other reason, a supplemental bill, or a bill in the nature of a supplemental bill, may be necessary to be filed in the cause, leave to file the same may be granted by any judge of the court on any rule day, upon proper cause shown and due notice to the other party. And if leave is granted to file such supplemental bill, the defendant shall demur, plead or answer thereto, on the next succeeding rule day after the supplemental bill is filed in the clerk's office, unless some other time shall be assigned by a judge of the court.

LVIII. It shall not be necessary in any bill of revivor or supplemental bill, to set forth any of the statements in the original suit, unless the special circumstances of the case may require it.

ANSWERS.

LIX. Every defendant may swear to his answer before any justice or judge of any court of the United States, or before any commissioner appointed by any circuit court to take testimony or depositions, or before any master in chancery appointed by any circuit court, or before any judge of any court of a State or Territory.

AMENDMENT OF ANSWERS.

LX. After an answer is put in, it may be amended as of course, in any matter of form, or by filling up a blank, or correcting a date, or reference to a document or other small matter, and be re-sworn, at any time, before a replication is put in, or the cause is set down for a hearing upon bill and answer. But after replication, or such setting down for a hearing, it shall not be amended in any material matters, as by adding new facts or defences, or qualifying or altering the original statements, except by special leave of the court, or of a judge thereof, upon motion and cause shown after due notice to the adverse party, supported, if required, by affidavit. And in every case where leave is so granted, the court, or the judge, granting the same, may, in his discretion, require that

the same be properly engrossed and added as a distinct amendment to the original answer, so as to be distinguishable therefrom.

EXCEPTIONS TO ANSWERS.

LXI. After an answer is filed on any rule day, the plaintiff shall be allowed until the next succeeding rule day to file in the clerk's office exceptions thereto for insufficiency, and no longer, unless a longer time shall be allowed for the purpose, upon cause shown to the court or a judge thereof; and if no exception shall be filed thereto within that period, the answer shall be deemed and taken to be sufficient.

LXII. When the same solicitor is employed for two or more defendants, and separate answers shall be filed, or other proceedings had by two or more of the defendants separately, costs shall not be allowed for such separate answers or other proceedings, unless a master, upon reference to him, shall certify that such separate answers and other proceedings were necessary or proper, and ought not to have been joined together.

LXIII. Where exceptions shall be filed to the answer for insufficiency, within the period prescribed by these rules, if the defendant shall not submit to the same, and file an amended answer, on the next succeeding rule day, the plaintiff shall forthwith set them down for a hearing on the next succeeding rule day thereafter, before a judge of the court; and shall enter, as of course, in the order book, an order for that purpose. And if he shall not so set down the same for a hearing, the exceptions shall be deemed abandoned, and the answer shall be deemed sufficient; provided, however, that the court, or any judge thereof, may, for good cause shown, enlarge the time for filing exceptions, or for answering the same, in his discretion, upon such terms as he may deem reasonable.

LXIV. If, at the hearing, the exception shall be allowed, the defendant shall be bound to put in a full and complete answer thereto, on the next succeeding rule day; otherwise the plaintiff shall, as of course, be entitled to take the bill, so far as the matter of such exceptions is concerned, as confessed, or, at his election, he may have a writ of attachment to compel the defendant to make a better answer to the matter of exceptions; and the defendant, when he is in custody upon

such writ, shall not be discharged therefrom but by an order of the court, or of a judge thereof, upon his putting in such answer and complying with such other terms as the court or judge may direct.

LXV. If, upon argument, the plaintiff's exceptions to the answer shall be overruled, or the answer shall be adjudged insufficient, the prevailing party shall be entitled to all the costs occasioned thereby, unless otherwise directed by the court, or the judge thereof, at the hearing upon the exceptions.

REPLICATION AND ISSUE.

LXVI. Whenever the answer of the defendant shall not be excepted to, or shall be adjudged or deemed sufficient, the plaintiff shall file the general replication thereto on or before the next succeeding rule day thereafter; and in all cases where the general replication is filed, the cause shall be deemed to all intents and purposes at issue, without any rejoinder or other pleading on either side. If the plaintiff shall omit or refuse to file such replication within the prescribed period, the defendant shall be entitled to an order, as of course, for a dismissal of the suit; and the suit shall thereupon stand dismissed, unless the court or a judge thereof, upon motion for cause shown, allow a replication to be filed *nunc pro tunc*, the plaintiff submitting to speed the cause, and to such other terms as may be directed.

TESTIMONY, HOW TAKEN.

LXVII. After the cause is at issue, commissions to take testimony may be taken out in vacation as well as in term, jointly by both parties, or severally by either party, upon interrogatories filed by the party taking out the same, in the clerk's office, ten days' notice thereof being given to the adverse party to file cross-interrogatories before the issuing of the commission; and if no cross-interrogatories are filed at the expiration of the time, the commission may issue *ex parte*. In all cases the commissioner or commissioners shall be named by the court, or by a judge thereof. If the parties shall so agree, the testimony may be taken upon oral interrogatories by the parties or their agents, without filing any written interrogatories.

LXVIII. Testimony may also be taken in the cause after it is at issue, by deposition, according to the acts of Congress.

But in such case, if no notice is given to the adverse party of the time and place of taking the deposition, he shall, upon motion and affidavit of the fact, be entitled to a cross-examination of the witnesses, either under a commission or by a new deposition taken under the act of Congress, if a court or a judge thereof shall, under all circumstances, deem it reasonable.

LXIX. Three months, and no more, shall be allowed for the taking of testimony after the cause is at issue, unless the court or a judge thereof shall, upon special cause shown by either party, enlarge the time; and no testimony taken after such period shall be allowed to be read in evidence at the hearing. Immediately upon the return of the commissions and depositions, containing the testimony, into the clerk's office, publication thereof may be ordered in the clerk's office by any judge of the court, upon due notice to the parties, or it may be enlarged, as he may deem reasonable under all circumstances. But by consent of the parties, publication of the testimony may at any time pass in the clerk's office, such consent being in writing, and a copy thereof entered in the order book, or endorsed upon the deposition or testimony.

TESTIMONY DE BENE ESSE.

LXX. After any bill filed, and before the defendant hath answered the same, upon affidavit made that any of the plaintiff's witnesses are aged or infirm, or going out of the country, or that any of them is a single witness to a material fact, the clerk of the court shall, as of course, upon the application of the plaintiff, issue a commission to such commissioner or commissioners as a judge of the court may direct, to take the examination of such witness or witnesses de bene esse, upon giving due notice to the adverse party of the time and place of taking his testimony.

FORM OF THE LAST INTERROGATORY.

LXXI. The last interrogatory in the written interrogatories to take testimony now commonly in use, shall in the future be altered, and stated in substance thus: "Do you know, or can you set forth any other matter or thing, which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this your examination, or the matters in question in this cause? if yea, set forth the same fully and at large in your answer."

CROSS BILL.

LXXII. Where a defendant in equity files a cross bill for discovery only against the plaintiff in the original bill, the defendant to the original bill shall first answer thereto, before the original plaintiff shall be compellable to answer the cross bill. The answer of the original plaintiff to such cross bill may be read and used by the party filing the cross bill, at the hearing, in the same manner and under the same restrictions as the answer, praying relief, may now be read and used.

REFERENCE TO AND PROCEEDINGS BEFORE MASTERS.

LXXIII. Every decree for an account of the personal estate of a testator or intestate, shall contain a direction to the master, to whom it is referred to take the same, to inquire and state to the court, what parts, if any, of such personal estate are outstanding or undisposed of, unless the court shall otherwise direct.

LXXIV. Whenever any reference of any matter is made to a master to examine and report thereon, the party at whose instance or for whose benefit the reference is made, shall cause the same to be presented to the master for a hearing on or before the next rule day succeeding the time when the reference was made; if he shall omit to do so, the adverse party shall be at liberty forthwith to cause proceedings to be had before the master, at the costs of the party procuring the reference.

LXXV. Upon every such reference, it shall be the duty of the master, as soon as he reasonably can after the same is brought before him, to assign a time and place for proceedings in the same, and to give due notice thereof to each of the parties or their solicitors; and if either party shall fail to appear at the time and place appointed, the master shall be at liberty to proceed *ex parte*, or in his discretion to adjourn the examination and proceedings to a future day, giving notice to the absent party or his solicitor of such adjournment; and it shall be the duty of the master to proceed with all reasonable diligence in every such reference, and with the least practicable delay; and either party shall be at liberty to apply to the court or a judge thereof, for an order to the master to speed the proceedings, and to make his report, and to certify to the court or judge the reasons for any delay.

LXXVI. In the reports made by the master to the court, no part of any state of facts, charge, affidavit, deposition, ex-

amination, or answer, brought in or used before them, shall be stated or recited. But such state of facts, charge, affidavit, deposition, examination, or answer, shall be identified, specified, and referred to, so as to inform the court what state of facts, charge, affidavit, deposition, examination, or answer, were so brought in or used.

LXXVII. The master shall regulate all the proceedings in every hearing before him, upon every such reference; and he shall have full authority to examine the parties in the cause upon oath, touching all matters contained in the reference; and also to require the production of all books, papers, writings, vouchers, and other documents applicable thereto; and also to examine on oath, *viva voce*, all witnesses produced by the parties before him, and to order the examination of other witnesses to be taken, under a commission to be issued upon his certificate from the clerk's office, or by deposition according to the acts of Congress, or otherwise as herein after provided; and also to direct the mode in which the matters requiring evidence shall be proved before him; and generally to do all other acts, and direct all other inquiries and proceedings in the matter before him, which he may deem necessary and proper to the justice and merits thereof, and the rights of the parties.

LXXVIII. Witnesses, who live within the district, may, upon due notice to the opposite party, be summoned to appear before the commissioner appointed to take testimony, or before a master or examiner appointed in any cause, by subpoena in the usual form, which may be issued by the clerk in blank, and filled up by the party praying the same, or by the commissioner, master, or examiner, requiring the attendance of the witnesses at the time and place specified, who shall be allowed for attendance the same compensation as for attendance in court; and if any witnesses shall refuse to appear, or to give evidence, it shall be deemed a contempt of the court, which being certified to the clerk's office by the commissioner, master, or examiner, an attachment may issue thereupon by order of the court or of any judge thereof, in the same manner as if the contempt were for not attending, or for refusing to give testimony in the court. But nothing herein contained shall prevent the examination of witnesses *viva voce* when produced in open court, if the court shall in its discretion deem it advisable.

LXXIX. All parties accounting before a master shall bring in their respective accounts in the form of debtor and creditor; and any of the other parties, who shall not be satisfied with the accounts so brought in, shall be at liberty to examine the accounting party *viva voce*, or upon interrogatories in the master's office, or by deposition, as the master shall direct.

LXXX. All affidavits, depositions, and documents, which have been previously made, read, or used in the court, upon any proceeding in any cause or matter, may be used before the master.

LXXXI. The master shall be at liberty to examine any creditor or other person coming in to claim before him, either upon written interrogatories, or *viva voce*, or in both modes, as the nature of the case may appear to him to require. The evidence upon such examination shall be taken down by the master, or by some other person by his order and in his presence, if either party requires it, in order that the same may be used by the court, if necessary.

LXXXII. The circuit courts may appoint standing masters in chancery in their respective districts, both the judges concurring in the appointment; and they may also appoint a master *pro hac vice* in any particular case. The compensation to be allowed to every master in chancery for his services in any particular case shall be fixed by the circuit court in its discretion, having regard to all the circumstances thereof; and the compensation shall be charged upon and borne by such of the parties in the cause, as the court shall direct. The master shall not retain his report as security for his compensation: but when the compensation is allowed by the court, he shall be entitled to an attachment for the amount against the party, who is ordered to pay the same, if, upon notice thereof, he does not pay it within the time prescribed by the court.

EXCEPTIONS TO REPORT OF MASTER.

LXXXIII. The master, as soon as his report is ready, shall return the same into the clerk's office, and the day of the return shall be entered by the clerk in the order book. The parties shall have one month from the time of filing the re-

port, to file exceptions thereto; and if no exceptions are within that period filed by either party, the report shall stand confirmed on the next rule day after the month is expired. If exceptions are filed, they shall stand for hearing before the court, if the court is then in session, or if not, then at the next sitting of the court, which shall be held thereafter by adjournment or otherwise.

LXXXIV. And in order to prevent exceptions to reports from being filed for frivolous causes, or for mere delay, the party, whose exceptions are overruled, shall, for every exception overruled, pay costs to the other party, and for every exception allowed, shall be entitled to costs—the costs to be fixed in each case by the court, by a standing rule of the circuit court.

DECREES.

LXXXV. Clerical mistakes in decrees, or decretal orders, or errors arising from any accidental slip or omission, may, at any time before an actual enrolment thereof, be corrected by order of the court or a judge thereof, upon petition, without the form or expense of a re-hearing.

LXXXVI. In drawing up decrees and orders, neither the bill, nor answer, nor other pleadings, nor any part thereof, nor the report of any master, nor any other prior proceeding, shall be recited or stated in the decree or order; but the decree and order shall begin in substance as follows: "This cause came on to be heard (or to be further heard, as the case may be,) at this term, and was argued by counsel; and thereupon, upon consideration thereof, it was ordered; adjudged and decreed, as follows, viz: " [Here insert the decree or order.]

GUARDIANS AND PROCHEIN AMIS.

LXXXVII. Guardians *ad litem* to defend a suit may be appointed by the court, or by any judge thereof, for infants or other persons, who are under guardianship, or otherwise incapable to sue for themselves; all infants and other persons so incapable, may sue by their guardians, if any, or by their *prochein ami*, subject, however, to such orders as the court may direct for the protection of infants and other persons.

LXXXVIII. Every petition for a re-hearing shall contain the special matter or cause in which such re-hearing is applied

for, shall be signed by counsel, and the facts therein stated, if not apparent on the record, shall be verified by the oath of the party, or by some other person. No re-hearing shall be granted after the term at which the final decree of the court shall have been entered and recorded, if an appeal lies to the Supreme Court. But if no appeal lies, the petition may be admitted at any time before the end of the next term of the court, in the discretion of the court.

LXXXIX. The circuit courts (both judges concurring therein) may make any other and further rules and regulations for the practice, proceedings and process, mesne and final, in their respective districts, not inconsistent with the rules hereby prescribed, in their discretion; and from time to time alter and amend the same.

XC. In all cases, where the rules prescribed by this court, or by the circuit court, do not apply, the practice of the circuit court shall be regulated by the present practice of the High Court of Chancery in England, so far as the same may reasonably be applied, consistently with the local circumstances and local convenience of the district, where the court is held, not as positive rules, but as furnishing just analogies to regulate the practice.

XCI. Whenever under these rules an oath is or may be required to be taken, the party may, if conscientiously scrupulous of taking an oath, in lieu thereof, make solemn affirmation to the truth of the facts stated by him.

XCII. These rules shall take effect, and be of force, in all the circuit courts of the United States, from and after the first day of August next; but they may be previously adopted by any circuit court in its discretion; and when and as soon as these rules shall so take effect, and be of force, the Rules of Practice for the circuit courts in equity suits, promulgated and prescribed by this court in March, 1822, shall henceforth cease, and be of no farther force or effect. And the clerk of this court is directed to have these rules printed, and to transmit a printed copy thereof, duly certified, to the clerks of the several courts of the United States, and to each of the judges thereof.

[The foregoing rules of practice were adopted by the Supreme Court of the United States at its January term, 1842.

Subsequently, at the December term, 1850, the 40th rule, preceding, was repealed by the following:]

XCHH. Ordered, that the fortieth rule heretofore adopted and promulgated by this Court as one of the rules of practice in suits in equity in the Circuit Courts, be and the same is hereby repealed and annulled. And it shall not hereafter be necessary to interrogate a defendant specially and particularly upon any statement in the bill, unless the complainant desire to do so to obtain a discovery.

II.

Summary of decisions affecting questions of Equity practice and pleading, made by the Supreme Court of Appeals of Virginia.

ANSWERS.

1. If a cause come on upon bill and answer, the latter must be considered as true in all its parts. *Kennedy v. Baylor*, 1 Wash. 162.

2. If a defendant, by his answer, admit that certain goods were to be charged to him, upon certain conditions, and this be the only evidence in support of such charge, it ought to be made upon the terms of that admission only. *Kerr & Co. v. Love*, 1 Wash. 172.

3. An executor, when called upon to account, is not permitted to swear himself into a title to part of his testator's estate. *Beckwith v. Butler et al.*, 1 Wash. 224.

4. The answer of a defendant in Chancery, is not evidence where it asserts a right affirmatively in opposition to the plaintiff's demand. In such case, he is as much bound to establish it by indifferent testimony, as the plaintiff is to sustain his bill. *Ibid. Paynes v. Coles*, 1 Munf. 373.

5. The testimony of one witness, without corroborating circumstances, is not sufficient to outweigh the answer when responsive to the bill. *Holmes, Ex'or v. Smock*, 1 Wash. 389. See *Chapman v. Turner*, 1 Call, 280.

6. The answer of one defendant in Chancery is not evidence against another. 1 Wash. 389.

7. If an answer in Chancery be contradicted by evidence in several important points, it is deprived of that weight which is allowed to answers by the rules of the court of equity. *Countz v. Geiger*, 1 Call, 190.

8. The answer of a defendant in Chancery, when responsive to the bill, is conclusive, unless disproved. *Maupin v. Whiting*, 1 Call. 224; 2 Call, 229; 2 H. & M. 393; 2 Munf. 43.

9. Where a discovery is sought by the bill, a responsive answer is clearly entitled to credit. *Chapman v. Turner*, 1 Call, 280.

10. When the allegations of the bill are denied by the answer, and not proved by the evidence adduced on the part of the plaintiff, the court of Chancery on hearing the cause ought not to direct an issue to try the points in controversy, but should dismiss the bill. *Pryor v. Adams*, 1 Call, 382.

11. The testimony of one positive witness, supported by strong circumstances, is sufficient to overthrow an answer. *Bullock v. Goodall*, 3 Call, 44.

12. If the answer deny imposition, and be supported by a commissioner's report, and acknowledgments by the plaintiff, it will not be set aside by evidence of loose conversations of parties, and conjectures of witnesses. *Harris v. Magee*, 3 Call, 502.

13. The answer of a defendant positively denying a fact charged in the bill, ought not to be outweighed by testimony not equally positive, on the other side. *The Auditor v. Johnson's Ex'x.*, 1 Hen. & Munf. 537.

14. Where a bill of review has been dismissed, on the ground that it ought not to have been allowed, the decree not being final, the complainant in that bill (being defendant to the original suit) is not authorized, in his subsequent defence, to make use of the answer to the bill of review. *Ellzey v. Lane's Ex'x.*, 4 Munf. 66.

15. An evasive answer (though not excepted to as such) outweighed by the testimony of one witness and circumstances. *Wilkins v. Woodfin, Adm'r.*, 5 Munf. 183.

16. A clerk stating in the transcript of the record, that certain answers, which are filed and copied in such transcript, were not noticed by the court, is not to be relied upon by the appellate court, if the contrary may be inferred from the decree itself. *Pickett et ux. v. Ohilton*, 5 Munf. 467.

17. If the caption of the decree name as defendants to the case certain persons whose answers are filed, and the decree state that the cause was heard upon the bill, answers and exhibits, it may be inferred that the answers of those persons were noticed by the court. *Ibid.*

18. The effect of the omission of a replication to an answer is that all the allegations in such answer are admitted to be true. *Ibid.* See *Kennedy v. Baylor*, 1 Wash. 163.

19. The question as to the admissibility and effect of the defendant's answer to a bill to set aside a will as evidence on

the trial of the issue *devisavit vel non*, considered by *Cabell and Starnard, J. Kincheloe v. Kincheloe*, 11 Leigh, 393.

20. It is a rule in equity that the answer of a defendant denying the allegations of the bill must be taken as true unless disproved by two witnesses, or by one witness and circumstances in his support; it is not in the power of the plaintiff to make his case an exception to this rule by stating in his bill that he expects to prove its allegations, and disclaiming a discovery from the defendant. *Thornton v. Gordon, &c.*, 2 Rob. 719.

21. A defendant by his answer admits, that certain goods were to be charged to him upon certain conditions, and this is the only evidence of such charge; it ought to be made upon the terms of that admission only. *Kerr & Co. v. Love*, 1 Wash. 172.

22. If a defendant called upon to account, for sales of certain public securities, denies the receipt of them, averring, that the proceeds were accounted for to the plaintiff "as would appear by the accounts and receipts annexed to the answer," such accounts and receipts ought to be produced, or if required, interrogatories respecting them should be answered *Clay v. Williams et al.*, 2 Munf. 105.

23. A bill of injunction to stay proceedings on a judgment, charges the plaintiff at law, with having failed to do an act, on which the equity of his claim depends, his answer takes no notice of that allegation; this will be considered by the court, on the hearing, as an admission that he has not done the act in question, and will decree against him without any exception to the answer, or any interlocutory order, taking the bill for confessed in part. *Page's Ex'or. v. Winston's Adm'r*, 2 Munf. 298. See opinion of Judge Carr in 4 Rand. 457.

24. If the plaintiff in equity call upon the defendant, as assignee of a bond, to say whether he had notice of the consideration thereof, when he received the money due thereon and in his answer he say that he had no such notice, when he took the assignment, the answer is not to be considered as admitting notice, at the time he received the money. *Edgar v. Donnelly et al.*, 2 Munf. 387.

25. If the plaintiffs in equity charge in their bill, that a deed of marriage settlement, under which they claim, was executed before the marriage, though recorded afterwards; it being also expressed in the recital of the deed, that the same is

made in contemplation of the marriage shortly intended to be solemnized, &c. and that allegation be not denied or noticed in the answer, it must be considered as admitted to, be true without further proof. *Scott et ux. v. Gibbon & Co.*, 5 Munf. 86. See Judge Carr's opinion in 4 Rand. 457.

26. Where the answer of a defendant omits to notice some of the allegations of the bill, and replies to others, the allegations not noticed are not to be considered as admitted. *Coleman v. Lyne's Ex'or*, 4 Rand. 454.

27. If a defendant, in his answer, admit that a slave claimed by him as a gift, was always in possession of the donor, he cannot be allowed to give evidence that the donee, had the possession, for such evidence varies from the defendant's admissions. *Shirley v. Long*, 6 Rand. 764. *Sed quære*.

28. A bond executed by B. to C. is assigned by C. to W. who brings suit on it against B., recovers judgment, and sues out execution without effect, then C. the obligee files a bill in Chancery in county court against B. the obligor and others, to set aside a conveyance of B. of land, on the ground of fraud, alleging that he has paid his assignee W. the amount due on his judgment against B. and so claims to stand in W.'s place, and to have the benefit of his judgment. The defendants answering deny fraud, but neglect the remainder of the allegations, and these allegations are not proven. The county court sets aside the deed as fraudulent, and decrees a sale of the whole land to satisfy B.'s claim; on appeal to Circuit court, the decree is reversed and the bill dismissed, there being no proof of the alleged payments, and so plaintiff does not appear to be a creditor by judgment. The decree of the county court is erroneous, for the allegations of payment made by plaintiff, though not denied by the answer, were not thereby admitted, but ought to have been proved. The Chancellor's decree is also erroneous in dismissing the bill for want of such proof; he should have retained the cause, or remanded it to the county court, to give plaintiff opportunity to adduce the proof. *Cropper v. Burtons et als.*, 5 Leigh, 426.

29. The answer of one joint partner in the name of both, deemed sufficient, the plaintiff having filed a general replication and taken no steps to compel an answer from the other partner. *Freelands v. Royall et al.*, 2 Hen. & Munf. 575.

30. Where the answer of the defendant omits to notice some of the allegations of the bill, and replies to others, plain-

tiff may except to the answer as insufficient. *Coleman v. Lyne's Ex'or*, 4 Rand. 454.

31. An answer cannot be excepted to as insufficient, after replication. *Ibid.* But see sec. 183, p. 79, *ante*.

32. If matter appear in the answer of the defendant in equity which is nowise alleged in the bill, it cannot justify a decree for plaintiff against defendant, though it might have been ground for such decree if it had been alleged in the bill. Per *Brockenbrough, J. Eib v. Martin*, 5 Leigh, 132.

33. An answer in Chancery admits the allegations in plaintiff's bill, but the certificate thereto, does not appear to have been made by a justice of the peace, or by any person empowered to administer the oath; defendant dies; this paper being filed in the clerk's office, will not be considered the answer of the party, nor evidence in the cause. *Stillingtons v. Brown et als.*, 7 Leigh, 271.

34. Case in which the defence of usury, relied on to defeat the plaintiff's whole claim, was held to be well made in the answer. *Smith v. Nicholas, &c.*, 8 Leigh, 330.

35. No rule is better settled, than that an answer of an infant by *guardian ad litem* cannot be read against him at all, for any purpose. Per *Baldwin, J. Bank of Alexandria v. Patton, &c.*, 1 Rob. 500.

36. An answer to a bill of discovery is sufficient, when it shows the defendant is protected from making the discovery sought by the bill. *Northwestern Bank v. Nelson*, 1 Grat. 108.

37. If an answer contain *impertinent* or *scandalous* matter, it will be referred to a commissioner, to expunge such matter at the costs of the party filing the answers. (*Ch. Taylor.*) *Mason v. Mason*, 4 Hen. & Munf. 414.*

* This, though not a decision of the Court of Appeals of Virginia, is here inserted because it states accurately the practice in this respect, in courts of equity. Here follows the answer in *Mason v. Mason* which was referred to the commissioner by Chancellor Taylor:

ANSWER.

"If Abraham Barnes Thompson Mason can address the hon. court under the title of orator, the clumsy clown James W. Wallace can do so too. Well then your orator asks the hon. court if Mrs. Elizabeth Mason (whose honesty and integrity will sound high in heaven) (and on earth where she is known,) is proverbial for too delicate a sense of justice and honor by

38. The defence of a purchaser for valuable consideration without notice may be made by answer as well as by plea. *Donnel et al. v. King's heirs et devisees*, 7 Leigh, 393.

39. A defendant in Chancery in Virginia, may at the same time, answer and demur to the same matter in the bill. *Dissentiente, Tucker P. Basset's Adm'r dec. v. Cunningham's Adm'r*, 7 Leigh, 402.

which she has injured her finances, nay brought herself from a sufficiency to want, I ask if she kept in her own possession the books keeping the accounts of the estate of James Wallace and Thompson Mason dec'd, how can the orator A. B. T. Mason know that there is a balance due from the one estate to the other? with what propriety can he accuse a character like Mrs. Mason's of embezzlement? How indelicate to such refined feelings as I presume the court to possess, will come such a charge against a father's widow.—Test their souls by analysis, will not A. B. T. Mason be found all caput mortuum? Mrs. Mason's like the diamond exposed to heat, no residuum? Your orator is no lawyer but follows another trade; is a dull plain man, a mere Tom Bowlin; and often gives offence where he means respect. Being clumsy and heavy in words, he knows no laws but those of honest integrity and has no guide but justice. It appears to him that if Mrs. Mason used the tobacco (but does not believe she used one pipe full) that she Mrs. Mason the adm'x. is propria persona the responsible person. The prayer of the orator A. B. T. Mason, even admitting the embezzlement, is a prayer to visit the sins of the parent upon the child, i. e. if the descendants of James Wallace are made defendants agreeable to the wish of the orator A. B. T. Mason.

The character of Thompson Mason deceased I revere. He appears to me from the best of my memory to have possessed too much soul; too much native honesty for the world he lived in—a just remark to his honorable manes.

To the best of my knowledge my brother Robt. Wallace clothed me generally and gave me what pocket money I got. From the most mature reflection I am fully satisfied that I am not indebted to the estate of Thompson Mason one cent. The orator A. B. T. Mason in his prayer to the hon. court says Thompson Mason retained tobacco as an indemnity against his disbursements, (I am not disposed to believe the assertions of A. B. T. Mason) but let us take his word for it, for I suppose that he knew not that such an acknowledgment is equal to a receipt in full. Let him then prove what T. Mason's ex'or did with the tobacco. He says Mrs. Mason used it, let him then prove it; even then the orphan proves his reimbursements, Thompson Mason dying with full indemnity in his hands. The orator A. B. T. Mason says Mrs. Mason detains the books of the estate. Without knowledge then on the subject he roundly asserts a great balance. Pray unde derivatur such information? Does it come from Tern

40. Defendant's demurrer to a bill being overruled, he may file any sufficient answer. *Northwestern Bank v. Nelson*, 1 Grat. 108.

41. When a defendant will be allowed to amend his answer in order to plead the statute of limitations. *White v. Turner's Adm'r*, 2 Grat. 502.

del Fuego, Labrador, Botany bay; or comes it fresh from the rapacious mouth of the white bear of Missouri? Mrs. Mason was compelled to sell her dower in a thousand or twelve hundred acres of land I believe to S. T. Mason for the pitiful sum of £100 to buy even a bed to lie on at the sale of Thompson Mason: does this smell of embezzlement of tobacco? does it shew she was full handed or poor indeed? It is the opinion of J. W. Wallace that if any fraud has been practised, it was not by the but too honest E. Mason, but by the orator A. B. T. Mason. A long life of virtue, honesty and religion will fully exculpate Mrs. Mason. Let the orator A. B. T. Mason put his hand on his heart if any there be in his breast and say "I never did but fairly." There was a paper from your court served on me accusing me of contempt to the court. I am innocent of such charge. I never said, acted or thought with any such design; to be plain, I know no more of your court than I do of the hydrography of the moon and have as little design to insult the one as navigate the waters of the other.

Articles in the Bill of A. B. T. Mason.

1. The orator says that J. Wallace died in 1776 having made a will.

Ans. Grant it, but I don't know the date of his death.

2. That T. Mason married the widow of J. Wallace in 1778.

Ans. Grant it, but I know not the date of the marriage.

3. E. Mason was ex'x. or adm'x. of J. Wallace.

Ans. I always heard and believe she acted for the estate of J. Wallace before her marriage with T. Mason.

4. T. Mason made disbursements for the est. of J. Wallace.

Ans. Ignorant on my part.

5. Thompson Mason died possessed of tobacco bonds to indemnify himself for disbursements made for J. Wallace's estate.

Ans. Ignorant on my part, but the orator A. B. T. Mason says he did. Now court, hear me; what became of this tobacco? Cannot you give to the orator A. B. T. Mason an anti-tobacco dose to work him the orator upwards, to work him the orator downwards, and make him the orator disgorge hogsheds of tobacco from both ends.

6. The estate of J. Wallace divided among his children.

Ans. I got I believe as much as the other children in negro property.

COMMENT. T. Mason lived and died largely in debt. Court, is it reasonable that he would sell his own produce and tobacco for the support of the children of J. Wallace and do it with a full conviction of an injury to his own children when he had the tobacco of J. Wallace's estate in his own

42. A defendant in default for want of an answer files a demurrer to the bill which is overruled; he is not entitled to two months in which to file his answer. *Reynolds v. The Bank of Virginia*, 6 Grat. 174.

43. Where plaintiff comes into equity on the ground of discovery, the whole answer is to be read, if it is used at all, as the testimony of a witness; and no part of it, pertinent to the discovery, is to be rejected because it is affirmative matter in avoidance of that which is admitted to be true. But though the answer is to be read, it is subject to be discredited, in the same manner as the testimony of any other witness. *Lyons v. Miller*, 6 Grat. 427.

44. It is the right of a defendant in equity to file his answer at any time before a final decree in a cause. *Bean, &c. v. Simmons*, 9 Grat. 389.

45. *Quære*. Whether if a decree settling the principles of the cause, though interlocutory, had been entered in the order book and the orders had been signed by the judge, the defendant would have been entitled, at the same term, or at any time previous to the final hearing of the cause, to file his answer. *Ibid*.

BILLS.

1. A bill exhibited in the High Court of Chancery, against the Attorney General, as representing the Commonwealth, but not requiring him to answer on oath, was, in this case, received as equivalent to a petition to that court. *Attorney General v. Turpin*, 3 Hen. & Munf. 548.

hands kept up forsooth for indemnity—would he not sell for their use, their own tobacco?

Oh! Jonah, why didst thou swallow the whale?

FATUQUER, to WIT: 1807, May 1st.

This day Jas. W. Wallace appeared before me, a justice of the peace, and made oath that this answer is true to the best of his memory and judgment.

SIMON MORGAN."

I, Richard Milton Cary, Deputy Clerk of the Circuit Court of the City of Richmond, in the State of Virginia, do hereby certify the foregoing to be a true copy of the answer of James W. Wallace filed in cause of *Mason vs. Mason et als.*, decided in the former Superior Court of Chancery held at Richmond, in the year 1809.

RICH'D. M. CARY.

2. Under the prayer for general relief, the plaintiff in equity cannot recover a claim distinct from that demanded, or put in issue by his bill. *Sheppard's Ex'or v. Starke et ux.*, 3 Munf. 29.

3. It seems, that a final decree in a suit by legatees for division of testator's estate, is a bar to a bill exhibited by the same persons or their legal representatives, suggesting that the executor had kept back part of the property, but not averring that this was new matter since discovered, or that the decree was obtained by fraud. *Legrand v. Francisco*, 3 Munf. 83.

4. *Quære*. After a suit in Chancery has been set for hearing, has the plaintiff a right to amend his bill before the hearing as a matter of course, upon paying the defendant all costs occasioned thereby; or is such amendment to be permitted only upon good cause shown? *Boykin's devisees v. Smith et al.*, 3 Munf. 102.

5. Where an executor has a claim against the estate of his testator, depending on a *quantum meruit* only, he may exhibit a bill in equity against his co-executors and the legatees, to have such claim established and fixed at a certain sum. In such case, he ought to state the claim with reasonable certainty, by setting forth his own estimate of his services; but, should he fail to do so, his bill ought not to be dismissed, but leave to amend it should be granted on motion. *Baker v. Baker et al.*, 3 Munf. 222.

6. A fact not charged in the bill, nor put in issue by the pleadings, cannot be relied on by the plaintiff. *Parker v. Carter et al.*, 4 Munf. 273.

7. A defect in the charging part of a bill, cannot be supplied by a subsequent interrogatory. *Ibid.*

8. Where the bill in chancery is defective, not only for want of proper parties, but in other respects, so that no decree for plaintiff can be entered, a decree dismissing the bill ought to be affirmed; but, if it appear probable that something might be recovered on a new bill, properly drawn, such affirmance should be without prejudice to any other suit the plaintiff may be advised to bring. *Stott et al. v. Baskerville et al.*, 6 Munf. 20.

9. It is error for a bill in chancery to pray that testimony may be perpetuated, and at the same time to ask relief. *Miller v. Sharp*, 3 Rand. 41.

10. The plaintiff in a cross bill, cannot contradict the assertions in his answer in the original suit. *Hudson et al. v. Hudson's Ex'or*, 3 Rand. 117.

11. A bill of peace will not lie where the rights and responsibilities of the several defendants, neither arise from, nor depend upon, nor are in any way connected with each other. *Randolph's Adm'x. v. Kinney*, 3 Rand. 394.

12. A creditor by judgment, obtained against an executor, may either sue out execution, and levy it on the visible property of the testator, if any there be; or if none be found, he may proceed against the executor, as for a *devastavit*, on account of misapplication of assets, or for that which amounts to an admission of assets; or he not knowing the state of the assets, may file a bill of discovery, and thereupon proceed at law; or the Court of Chancery may retain the cause, and determine disputes between the parties. *White et al. v. Banister's Ex'ors*, 1 Wash. 166.

13. Where a discovery is sought by the bill, a responsive answer is clearly entitled to credit. *Chapman v. Turner*, 1 Call, 280.

14. The courts of Chancery have jurisdiction in all cases, where a discovery appears to be necessary, and the plaintiff has a right to demand it. *Pryor v. Adams*, 1 Call, 382.

15. If the bill, in order to give the court jurisdiction make a mere colorable suggestion, that a discovery is wanting, the defendant may by plea, deny the fact, and ground his objection to the jurisdiction on that denial; which fact, thus put in issue, is to be tried by the court, according to the usual course of Chancery causes. If the decision be for the defendant, his objection operates; if for the plaintiff, the question still remains to be decided, whether the fact alleged be a sufficient ground of equity to sustain the jurisdiction. *Ibid.*

16. On a bill for a discovery, if it appear on its face, that a discovery is not necessary, the defendant may demur to the bill, in which case the demurrer is to be considered as a plea to the jurisdiction, so as to take the case out of the act precluding appellate Courts, (if there be a plea to the jurisdiction in the inferior court,) from proceeding to a reversal for want of jurisdiction. *Ibid.*

17. The jurisdiction of the court will be sustained, until the hearing at least, the demurrer being overruled. But if, after the demurrer has been overruled, the answer and other

testimony should contradict the allegations of the bill, upon the point conferring jurisdiction; *quære*, whether the court may still consider its jurisdiction sustained, by the implied admission in the demurrer of the truth of those allegations. *Ibid.*

18. In a bill brought for discovery and for the conveyance of land or other estate, all persons interested in the land or other estate, ought to be made parties. *Key's Ex'ors v. Lambert*, 1 Hen. & Munf. 380.

19. After a judgment against an executor, and a return of "no effects," on an execution against the goods and chattels of his testator, a suit in equity may be brought for a discovery of the assets; to which suit the securities of the executor and all other persons, (however remotely concerned in interest,) against whom a decree can be rendered, ought to be made defendants. *Clarke v. Webb et al.*, 2 Hen. & Munf. 8.

20. Where a plaintiff sues in Chancery, for a conveyance of a specific tract of land, and also for a conveyance of other lands, to make up a deficiency of quantity, (relating to which deficiency he prays a discovery,) but according to the contract appears entitled to compensation in money and not in lands; the court, after decreeing the first mentioned conveyance, (the deficiency, and the sum to be allowed for it, being ascertained,) will go on to decree the compensation, without turning the party over to a court of law. *Chinn v. Heale*, 1 Munf. 63.

21. In cases where it is proper and necessary, to go into equity for a discovery, the court having possession of the subject, will proceed to decide the cause, without turning the parties round to a court of law, notwithstanding, (if such discovery, had not been necessary,) relief might originally have been had at law. *Chichester's Ex'x. v. Vase's Adm'r.*, 1 Munf. 98.

22. To give a court of equity jurisdiction on the ground of discovery, it is not sufficient to charge, that certain facts are known to the defendants, and ought to be disclosed by them, but it should be averred, that the plaintiff is unable to prove such facts by other testimony. *Duvals v. Ross*, 2 Munf. 290.

23. A bill of discovery, to obtain evidence, which might have been useful in a trial at law, must be filed pending the suit at law, unless some sufficient excuse is shown, why it was not filed at that time. *Faulkner's Adm'r. v. Harwood*, 6 Rand. 126.

24. *Quære*. Whether a creditor *at large* can maintain a bill in Chancery against the executor of the debtor for a discovery and account of assets, and satisfaction? *Poindexter's Ex'ors. v. Green's Ex'ors.*, 6 Leigh, 504.

25. In a suit in equity to enforce payment of a bond debt, 28 years after the right to demand it accrued, there being no remedy, under the circumstances of the case, but in equity, the bill, to rebut the presumption of satisfaction arising from lapse of time, properly calls on the defendant to answer whether the debt has been paid or not. *Baker v. Morris's Adm'r.*, 10 Leigh, 284.

26. Where assumpsit is brought at law, and the statute of limitation pleaded, a bill of discovery may be filed in equity, calling on the defendant to answer whether he has not made a new promise within the term of limitation, in order to use this matter on the trial of the action of law, in avoidance of the bar of the statute, and the defendant shall answer the allegation of the new promise on oath. *Ibid.*

27. A defendant is not bound to disclose or answer matters which will expose him to pains, penalties or punishment, or to a criminal prosecution. And if he will be probably subjected to danger by his answer, he will be protected. *Northwestern Bank v. Nelson*, 1 Grat. 108.

28. If the objection to the discovery appears on the face of the bill, defendant may demur. *Ibid.*

29. But if not appearing on the face of the bill, the defendant must claim his protection by plea or answer; the averments of which, if traversed by replication, must be established by sufficient evidence. *Ibid.*

30. If plaintiff, seeking a discovery, relies on the fact that a prosecution would be barred by the statute of limitation, this fact should appear from the statements of the bill. *Ibid.*

31. A testator having devised slaves to his wife for life, remainder to his children; if the wife marry again, and her second husband sell one of the slaves to a *bona fide* purchaser, who had no notice of the right of those in remainder; and before receiving such notice, sold the same slave to another person; and they bring a bill *quia timent*, the Court of Chancery ought to decree that the husband shall give security for the forthcoming of all the slaves and their increase at the death of his wife, but should dismiss the bill as to the purchaser. *Chisholme v. Starke*, 3 Cull, 25.

32. Before the act of 1794, Ed. 1803 and 1804, p. 223, c. 174, a surety in a bond was not absolved from the obligation by requesting the obligee to sue, and his failing to do so, without anything active between him and the principal, tending to show a new contract for forbearance. *Croughton v. Duval*, 3 Call, 69.

33. In such case, the surety might have paid the money, taken an assignment of the bond, and sued the principal himself; or he might have brought his bill *quia timet* to compel the principal to pay, and the creditor to receive the money. *Ibid.*

34. The power of a court of equity to rule a tenant for life of slaves, or other property, to give security that the property shall be forthcoming at his or her death, is to be exercised, not as a matter of course, but of sound discretion, according to circumstances. *Holladay et ux. v. Coleman et ux.*, 2 Munf. 162.

35. A bill should not be dismissed for defect of parties if plaintiff has shown himself entitled to relief on the merits; but he should be allowed to amend his bill and make the necessary parties. *Jameson's Adm'x. v. Deshields*, 3 Grat. 4.

36. Plaintiff, after setting out his case in his bill states what he understands is the pretension of the defendant. This is not such an allegation as will constitute the answer responsive thereto, evidence, and thus throw the burden of disproving it upon the plaintiff. *Leas' Ex'or. v. Eidson*, 9 Grat. 277.

37. Bill being filed for the specific execution of a contract for the exchange of lands, if it appears in the progress of the cause that the defendant cannot comply with his contract, the plaintiff may amend his bill and ask for a rescission of the contract and for such other relief as under the circumstances he is entitled to. *Parrill v. McKinley*, 9 Grat. 1.

BILL OF REVIEW.

1. Where the accounts of an executor have been discussed for a long time in the Court of Chancery, before and after the appeal, and having become intricate from the manner of stating them, if the bill of review be applied for to the last decree of the Court of Chancery, purporting to be made in conformity to the decree of Court of Appeals, and leave to file the bill be refused, the Court of Appeals will correct what is or-

roneous in the report of the commissioner acting under its own decree, and affirm the residue in order to prevent further delay, although the affirmance may possibly be injurious in some instances. *Cary, &c. Ex'ors v. Macon et al.*, 4 Calh. 606.

2. When a bill of review alleges new matters which are denied by the answer, it will be dismissed at the hearing, unless the plaintiff proves the new matters, and that they were discovered after the decree was made. *Barnet & Co. v. Smith & Co.*, 5 Call, 98.

3. If a bill of review, showing just cause, be offered and refused by the Chancellor, an appeal lies to the Court of Appeals. *Lee's Infants v. Braxton*, 5 Call, 459.

4. A bill of review must suggest error in law, or newly discovered matter, or it cannot be sustained. *Triplet v. Wilson et al.*, 6 Call, 47.

5. Where a decree has been affirmed by the Court of Appeals, a bill of review ought not to be granted to reverse it for any errors on the face of the proceedings; but if new matter be produced which was unknown to the party applying, at the time of the decree, the Court of Chancery may, and if the evidence warrant it, should receive a bill of review. *M'Call v. Graham et al.*, 1 Hen. & Munf. 13.

6. Additional circumstances merely confirming facts proved in the original cause, do not furnish sufficient grounds for a bill of review. *Randolph's Ex'ors v. Randolph's Ex'ors*, 1 Hen. & Munf. 181.

7. An attachment having been served to compel performance of an erroneous decree in Chancery, and the defendant having been induced, under influence of the decree, and duress of the attachment, (without knowing his rights,) to pay a sum of money, and execute an obligation for a farther payment; on a bill of review, the money was decreed to be refunded, and the obligation to be surrendered. *Nelson v. Sudarth et al.*, 1 Hen. & Munf. 350.

8. An appeal ought not [previous to statute allowing appeals from interlocutory decrees] to have been allowed by the Court of Appeals, from an order of a Superior Court of Chancery, rejecting a motion to allow a bill of review, where the right of property had been decided, and a writ of *habere facias possessionem* awarded, but an account remained to be taken, and the commissioner's report had not come in; such decree being interlocutory only. *Bowyer v. Lewis*, 1 Hen. & Mun. 554.

9. The distinction between a bill of review, and a supplemental bill, in the nature of a bill of review, is this; a bill of review forms no part of the proceedings in the original cause, but is offered after the suit is ended: A supplemental bill in the nature of a bill of review, supposes an existing cause; is received and incorporated with the papers in that cause, and may be regarded as an amended bill; and if such bill be rejected, the order rejecting it is interlocutory only. By Wickham *arguendo*. *Ibid*.

10. A bill of review cannot be brought, until the decree sought to be reviewed, and reversed, is final and the parties out of court. *Ellzey v. Lane's Ex'x*, 2 Hen. & Munf. 589.

11. A bill of review lies only for new matter discovered since the decree, or for errors apparent on its face. *Quarrier v. Carter's rep.*, 4 Hen. & Munf. 242.

12. A cause may be re-heard on a petition presented before the term has passed, in which the final decree was pronounced; but, not afterwards, except by bill of review.—(*Ch. Taylor*.) *Hodges v. Davis*, 4 Hen. & Munf. 400.

13. It should appear that the defendants, against whom a decree is entered, had answered the bill, or stood out process of contempt; and if this be omitted, a bill of review may be filed on the ground of error on the face of the decree. *Braxton v. Lee's heirs*, 4 Hen. & Munf. 376.

14. Want of notice of the time and place of a commissioner's taking an account, or the court's acting upon the report too soon, are not sufficient reasons for a bill of review; such objections not having been taken (as they ought to have been) before the rendition of the decree. *Winston v. Johnson's Ex'ors*, 2 Munf. 305.

15. New matter is no ground for a bill of review, unless it was discovered since the decree was pronounced. *Ibid*.

16. A decree which is final in all respects, except that "liberty is reserved to the parties, or either of them, to resort to the court for its further interposition, if it be found necessary," may be amended, on motion, in a summary way, or by bill of review. *Sheppard's Ex'or v. Starke et ux.*, 3 Munf. 29.

17. It seems, that a final decree in a suit by legatees for division of a testator's estate, is a bar to a bill exhibited by the same persons, or their legal representatives, suggesting that the executor had kept back part of the property; but not

averring that this was new matter since discovered, or that the decree was obtained by fraud: *Legrand v. Francisco*, 3 Munf. 83.

18. It is no ground for a bill of review, that the party was prevented from proving certain important facts by wrong advice of one of his counsel; or that the other was unable to attend to the cause when called for trial, which circumstance was unknown to the party, until after the decree. *Franklin v. Wilkinson*, 3 Munf. 112.

19. Where a bill of review has been dismissed, on the ground that it ought not to have been allowed, the decree not being final, the complainant in that bill, (being defendant to the original suit,) is not authorized in his subsequent defence to make use of the answer to the bill of review, as evidence in his favor. *Ellzey v. Lane's Ex'x.*, 4 Munf. 66.

20. A bill of review to a decree pronounced before the 11th February, 1814, could not be received after five years had elapsed from the date of such decree. *Shepherd v. La-rue*, 6 Munf. 529.

21. The act of limitation need not be pleaded against a bill of review, for the bill itself should show that it is exhibited within the time prescribed by law; or that the complainant is protected by some of the provisions of the act, otherwise it ought not to be received. *Ibid.*

22. In such case, if the fact alleged to prevent the operation of the act be false, it may be denied by the answer of the other party, and if the proof be in his favor the bill should be rejected. *Ibid.*

23. It is not sufficient ground for a bill of review, that certain papers on which the complainant's right to a decree depended, and which he intended to exhibit with his original bill, were lost or mislaid by his counsel, and not found till after the decree against him. *Jones v. Pilcher's devisees*, 6 Munf. 425.

24. To a final decree for S. against T., the latter files a bill of review for errors in law in the proceedings and decree; S. in his answer cannot allege any new matter of fact. *Thorn-ton v. Stewart*, 7 Leigh, 128.

25. Bill of review of a decree for errors at law, dismissed by the Court of Chancery; this decree is reversed by thi,

court, and the original decree reversed, yet it appearing that the plaintiff might have a just claim, the original cause was remanded for further proceedings. *Ibid.*

26. An interlocutory decree in Chancery, deciding a question of fact in litigation, pronounced in the progress of an account, on an exception to a report, or instruction to the commissioner, as to the propriety of items of debit or credit, is not such a final decree, as precludes a party from taking new evidence touching the same question of fact, without obtaining a review or re-hearing of the decree, and without showing that the new evidence had been discovered since the decree. *Dunbar's Ex'ors v. Woodcock's Ex'or*, 10 Leigh, 629.

27. A justice of the peace having failed to forward a deposition taken by him, to the clerk of the court in which the cause is pending, and the cause having been heard and decided without it, is no ground for a bill of review. *Niday v. Harvey & Co et als.*, 9 Grat. 454.

28. A bill of review for error on face of decree will not lie for error in a commissioner's report, to which there was no exception, and the correctness of which might be affected by extraneous proof. *Mosby's adm'r et als. v. Mosby's adm'r*, 9 Grat. 584.

COMMISSIONERS.

1. In a suit to foreclose equity of redemption, commissioners are appointed by court to ascertain the damage the land has sustained, while in possession of mortgagee, and deduct the amount reported from the payments made by the mortgagor. Decree affirmed. *Kennedy v. Baylor*, 1 Wash. 163.

2. In the above case the commissioners omitted to state the time or place of meeting, or whether defendant had notice. No exception being taken in court below; no ground for reversal. *Ibid.*

3. The value and profits of land, being in the nature of damages, should be ascertained by a jury, not by commissioners. *Eustace v. Gaskins*, 1 Wash. 188. Contra, *Roberts's widow et al. v. Stanton*, 2 Munf. 129.

4. Although it appear on the face of commissioner's report, that he fixed the value of certain slaves by guess-work, yet, if it do not appear to be unreasonable either way, and no exception being taken in court below; not to be noticed in court above. *Beckwith v. Butler*, 1 Wash. 224.

5. An error apparent on the face of an account in a commissioner's report, is ground for reversing a decree confirming it, though no exception has been taken below. *Walker's Ex'ors v. Walke*, 2 Wash. 195. *Sed quære*.

6. On a general order of reference to a commissioner, of all accounts between the parties, if he state an account as to one subject only, omitting others, and his report be confirmed by the court, it is a sufficient ground for reversing the decree. *Harris v. Magee*, 3 Call, 502.

7. A Court of Chancery ought not to decide on accounts mutually existing and controverted between the parties without referring the accounts to commissioner to report thereon. *Bland's Adm'r. v. Wyatts*, 1 Hen. & Munf. 543.

8. An order of the Court of Chancery, to make up an account, without saying before whom it is to be done, must be executed before one of the master commissioners of the court. *Anderson v. Gest*, Ch. Taylor, 2 Hen. & Munf. 26.

9. The court cannot appoint commissioners to make up an account out of the State, except by consent of parties. *Ibid*.

10. *Quære*, whether commissioners appointed to take depositions, can, by their own authority, adjourn the taking thereof to any other convenient time and place, in the event, that the business cannot readily be finished on the day, and at the place to which the notice applies; no intended adjournment, from day to day, until the business be finished, being expressed in such notice. *Marshall v. Frisbie*, 1 Munf. 247.

11. It is not error in a court of equity, to direct commissioners instead of a jury, to state and report an account of the profits of land. *Roberts's widow et heirs v. Stanton*, 2 Munf. 129.

12. A commissioner's report, if erroneous on its face, may be objected to, at the hearing of the cause, though no exception be previously filed; and also in the appellate court, though no exception appear to have been taken in the court below, but without such exception, it cannot be impeached on grounds, and in relation to subjects, which may be affected by extraneous testimony. *White's Ex'ors v. Johnson et al.*, 2 Munf. 285.

13. A failure to mention, in a commissioner's report, that notice was given to the parties, is not error sufficient to reverse a decree, if no exception to the report appear in the record. *Ibid*.

14. Want of notice of the time and place of a commissioner's taking an account, or the court's acting on the report too soon, are not sufficient reasons for a bill of review; such objections not having been taken as they ought to have been before the rendition of the decree. *Winston v. Johnson's Ex'ors*, 2 Munf. 305.

15. A sale of land at auction, by commissioners, in obedience to a decree in Chancery, ought not to be set aside on the ground, that, after the land had been cried a considerable time, they caused a limitation of time for further bidding to be proclaimed, which was afterwards repeatedly done away, and the sale again opened; nor because the day of sale was cloudy, and occasionally rainy; it not appearing with certainty that any person who would have bid for the land was hindered thereby from attending; nor because the witnesses generally thought the land was cried rather precipitately, and without due notice; one stating, that, it was proclaimed more than once, by the orier, that the property was about to be struck off; that the commissioners made proclamation also to the same effect, by directing the crier not to dwell; and that about three minutes elapsed, after the last bid, before the land was struck off. *Fairfax v. Muse's Ex'ors*, 4 Munf. 124.

16. Exceptions are taken to a commissioner's report, and court re-commits the report, without passing on the exceptions. The re-committed report is not excepted to. The exceptions to the first report are thereby waived. *Kee's Ex'or v. Kee's creditors*, 2 Grat. 116.

17. A commissioner to whom accounts are referred, gives notice to the parties by publication in a newspaper, of the time and place of taking the accounts. An exception by a party for want of personal service where that was practicable, should not be sustained, unless he shows by his affidavit or otherwise, that he had not such information of the taking of the accounts, as would have enabled him to attend. *McClandish, Adm'r, &c. v. Edlos et als.*, 3 Grat. 330.

18. When a commissioner, in his regular proceedings to adjust and settle accounts referred to him, takes the depositions of witnesses to enable him to act upon the subject, his general notice to the parties of such proceedings is sufficient, without a special notice from him, or the adverse party, that such depositions will be taken. *Ibid.*

19. A claim of a creditor not reported on by the commissioner, may be directed to be considered as a claim stated in the report; and will be open to all just exceptions. *Ibid.*

DECREES.

1. Surety files a bill praying an injunction to a judgment against him, and asks that land taken by creditors from the principal as security, by an assignment of a deed thereof, might be decreed to be sold. Court decrees—that upon payment being made by him of a balance due, with interest thereon, and all costs at law, the injunction to be made perpetual, and on such payment being made the creditor should deliver and assign to the surety, the deed for and papers relative to the land, to remain as security for his indemnification, and the surplus for the benefit of the debtor. If the debt be not paid in a certain time, the land to be sold by commissioners in Chancery at public sale for cash, the time and place to be advertised in one of the papers. This decree to be satisfied out of the proceeds, and the surplus, after satisfying the surety all his costs at law and equity, to be paid to the debtor. *Groves v. Graves*, 1 Wash. 1.

2. If a decree for sale of mortgaged land be for the whole sum mentioned in the mortgage, when only part is due; yet a purchaser at such sale has a better title to the land than a person claiming under the mortgagor by a contract subsequent to the mortgage: but such person is entitled to the surplus, of the price for which the land is sold under the decree, after the mortgagee has received the sum actually due on the mortgage, with his costs. In such case, therefore, upon a bill filed by both the purchasers against the mortgagee, the court should decree conveyance to be made by the mortgagee and the purchaser claiming under the mortgagor, and possession of the land to be delivered to the purchaser at the sale, upon his paying to each the sums, to which they stand respectively entitled as aforesaid. *Thompson v. Davenport*, 1 Wash. 126.

3. The conveyances so to be made, should be with special warranty “against themselves, and their respective heirs, and all claiming under them respectively.” *Ibid.*

4. A party, applying to a court of equity for an account, subjects himself, though plaintiff, to a decree for a balance found due from him to the defendant. *Hill et al. v. Southerland's Ex'ors*, 1 Wash. 128.

5. The Court of Chancery cannot make any alteration in the provisions of a decree of the Court of Appeals, certified thither for farther proceedings in order for a final decree. *White v. Atkinson*, 2 Call, 376.

6. A decree entered at one term of the Court of Appeals, by which the cause is not put off the docket, may be set aside at a subsequent term. *Baumarchais's Case*, 3 Call, 122.

7. It is not necessary to state in a decree in Chancery, that all the preliminary steps towards maturing the cause for hearing were taken; it being intended where the cause is set for hearing, that it was done regularly, unless the contrary be shown. *Quarrier v. Carter's rep.*, 4 Hen. & Munf. 242.

8. A decree against devisees, holding by several and distinct devises, ought not to be joint but *pro rata*. *Mason's dev's v. Peter's Adm'r.*, 1 Munf. 487.

9. Upon an appeal from a decree in Chancery, an error to the injury of the appellee should be corrected though he did not appeal. *Day's Ex'or v. Murdock*, 1 Munf. 460.

10. A decree in Chancery declaring the court's opinion, that an agreement for the sale of a tract of land, should be specifically performed by both parties, and directing the vendee to execute a mortgage of the same land to secure the purchase money, is to be understood, as requiring the vendor, in the first place, to make a title to him. *Mayo v. Purcell*, 3 Munf. 243.

11. If a defendant, (with full knowledge of a decree in Chancery, directing him to deliver certain slaves to commissioners appointed to divide them,) purchase up executions against the plaintiff, and cause the same to be levied upon his undivided interest in those slaves, which interest is thereupon sold at an under rate, the sale ought to be set aside, and the slaves with their increase and profits still held liable to the provisions of the decree. *Ross v. Hook's Adm'r.*, 4 Munf. 97.

12. If without fraud or collusion, a decree be rendered by a court of competent jurisdiction against an executor, he may bring his suit in equity against the legatees, for contribution to satisfy such decree, without paying the money himself; and without having appealed to a superior court; though requested and advised to do so. *Bowers's Ex'or v. Glendenning*, 4 Munf. 219.

13. It is no objection to a decree, that it is nominally in favor of one defendant against another, if it be substantially in favor of the complainant. *West v. Belches*, 5 Munf. 187.

14. A decree ought not to be reversed for uncertainty, in matters, as to which it is only interlocutory, and may be perfected by application to the court. *Birchett et al. v. Bolling*, 5 Munf. 442.

15. A clerk stating in the transcript of the record, that certain answers, which are filed and copied in such transcript, were not noticed by the court, is not to be relied on by the appellate court, if the contrary may be inferred from the decree itself. *Pickett et ux. v. Chilton*, 5 Munf. 467.

16. If the caption of the decree name as defendants to the case certain persons whose answers are filed, and the decree state that the cause was heard on the bill, answers and exhibits, it may be inferred that the answers of those persons were noticed by the court. *Ibid.*

17. It seems that where a decree against executors for a legacy is made upon their confessing assets sufficient to satisfy the same (without specifying whether such assets consist of money or other property) such decree may with propriety direct that they pay the legacy and interest, with the costs of the suit, out of the said assets, if so much thereof they have; if not, out of their own estates. *M'Rae's Ex'or v. Brooks et ux.*, 6 Munf. 157.

18. A decree against executor for a legacy, though made upon a confession of assets, and without their expressly demanding bond and security from the plaintiff, is yet erroneous, if it do not require such bond and security to be given before the defendants be compelled to pay their legacy. *Ibid.* *Stovall's Ex'or v. Woodson et ux.*, 2 Munf. 308; *Rootes v. Webb*, 4 Munf. 77.

19. A final decree by default may be set aside at a subsequent term, for good cause shown, in a case where relief cannot be given by bill of review, or bill to impeach the decree for fraud in obtaining it. *Erwin v. Vint*, 6 Munf. 267.

20. The circumstances shown in this case were, that the defendant against whom the decree was rendered, was prevented by mistake and accident from filing his answer, and that in fact his title was good to the land in controversy. *Ibid.*

(*Note.* In this case, a bill to set aside the decree was filed, but the proper mode of proceeding appears to be by petition.)

21. A court of equity may decree in favor of one defendant against another; in a case where the same decree operates in favor of a complainant by subjecting in the first instance, that defendant, who ought ultimately to pay the debt. *M'Neil et al. v. Baird*, 6 Munf. 316.

22. If it be stated in the transcript of a decree in Chancery, that "the cause came on to be heard, on the bill, answer and exhibits," such hearing must be understood to have been in exclusion of the depositions, contained in the record, no proof appearing of notice of the time and place of taking those depositions. *Shumate v. Dunbar*, 6 Munf. 430.

23. In such case, if the answer deny the equity in the bill, and be not impugned by the exhibits, a decree in favor of the plaintiffs should be reversed, and the bill dismissed. *Ibid.*

24. *Quære.* Whether it be regular in a decree for sale of mortgaged premises, to direct the proceeds of such sale to be paid over to the plaintiff, before the sale shall have been confirmed by the court. *Anderson's Adm'r v. Davies's et al.*, 6 Munf. 484.

25. A decree against purchasers of a tract of land, encumbered by a mortgage to secure the payment of an annuity, ought to provide, that so much of their lands, respectively, be sold, as will be sufficient to pay their proportions of the sum remaining due, and unsatisfied by a sale of so much of the tract, as was retained by the vendor, and liable to be sold; except so far as they shall pay their respective proportions of such debt, and agree to hold their lands subject to the future decree of the court for their proportions of any sums growing due to the plaintiff thereafter. *Mayo v. Tomkies*, 6 Munf. 520.

26. A mortgagee of lands and slaves, cannot be compelled to resort to a sale of the slaves before he shall disturb the possession of *bona fide* purchasers of the lands from the mortgagor; but the decree against such purchasers ought to permit them, after satisfying the claim of the mortgagee, to seek indemnity out of the mortgaged slaves, or from the estate of the mortgagor, or of any other person liable to such demand, either so far as the mortgagee might be able to charge such party or otherwise. *Ibid.*

27. It is error to decree against an executor absolutely, that he shall pay money at fixed future periods, in respect of funds not in hand, but which shall then come into his hands. *Hite's Ex'or v. Hite's legatees*, 2 Rand. 409.

28. Where the representative of a sheriff is sued on account of an estate committed to his hands, and it appears that his deputy (who is also sued) had the entire management of the estate, the court may decree against the deputy in the first instance, if assented to by the plaintiff, reserving liberty to him to resort to the court, for ulterior decrees against the other parties; but if such assent be not given, it is the duty of the court to decree between the defendants, in order to throw the burden on the person ultimately liable. *Cocke v. Harrison*, 3 Rand. 494.

29. If there be two decrees on the same day against a defendant's land, the whole, and not a moiety only, of the land ought to be directed to be sold, on the ground that at law, two judgments would each have taken a moiety if it had been extendible. *Coleman v. Cocke*, 6 Rand. 618. Under one decree this may now be done. See Code of Virginia, chap. 187, sec. 8.

30. A decree in Chancery, disposing of the whole subject, deciding all questions in controversy, ascertaining the rights of all parties, and awarding costs, though it appoint a commissioner to sell part of the subject, and account for and pay the proceeds to the parties, with liberty to them to apply to the court to add other or substitute new commissioners, or for a partition of the subject directed to be sold, in kind, is a final decree. *Harvey et ux. v. Branson*, 1 Leigh, 108.

31. Suit in Chancery against A. and B., decree against A. for debt, and against B., declaring a conveyance by A. to him, fraudulent as against plaintiffs: *ca. sa.* issued on decree against A. for the debt, and executed; then B. appealed from the decree, so far as it affected him, and the court reverses the decree so far as it affected B., but held, it could not reverse the decree against A. who had not appealed, though the Court of Chancery had no jurisdiction to make the decree against him. *Tate v. Liggat, &c.*, and *Liggat, &c. v. Morgan, &c.*, 2 Leigh, 84. Distinguished from *Lewis v. Thornton*, 6 Munf. 87.

32. A. and B. are co-defendants in a suit in Chancery, for recovery of a parcel of slaves and an account of their profits. B. claims the slaves under a mortgage to him by his co-de-

fendant A.; there is a decree for the slaves and profits, against both defendants : B. alone appeals from the decree; the court holding that the plaintiffs had no right, considered the whole cause before it, on B.'s appeal, and dismissed the bill as to A. and B. both. *Dickenson v. Davis et als.*, 2 Leigh, 401.

33. On a foreign attachment in Chancery against absent debtor and home defendant, as garnishee, decree against absent defendant for debt, and against home defendant for debt due by him to absentee, to be paid plaintiff, in part of a debt due him by absentee; the absentee being in default, the home defendant appeals : *Held*, the home defendant cannot, in the appellate court, contest the justice of the decree, as against the absentee, but only so much of it as affects himself. *Heffernan's Adm'r v. Grymes's Adm'r*, 2 Leigh, 512.

34. It seems there cannot properly be a decree between co-defendants in equity, in any case in which the plaintiff is not entitled to a decree against both or either, and it would be inconvenient to extend that practice further. *Hubbard v. Goodwin*, and *Kennedy v. Same*, 3 Leigh, 492.

35. The Testator by his will desires, that, when his affairs are settled and all his debts paid, his slaves be emancipated according to law, and those under age and over forty to be equally in the care of his wife, son and daughter, and that the above may be done by his executors; upon bill in Chancery by slaves, as paupers, against executor, charging that ample fund had been raised out of their profits to pay debts, and praying an account of administration, and of their profits; and decree for their manumission and for excess of profits above the debts, the Chancellor, in 1809, finding that ample fund to pay the debts has been raised out of the profits, though debts not yet finally liquidated and paid—decrees, that the executor shall manumit them, reserving liberty to them to resort to the court for a distribution of any surplus of profits which might remain after liquidation and payment of debts, or for other arrangement in respect to such surplus. This decree is final as respects their manumission, but making no disposition of the surplus of profits. *Paup Adm'r, et als. v. Mingo, &c.*, 4 Leigh, 163.

36. Testator bequeaths, that his executor shall pay to his daughter £25 per annum, so long as she shall remain single; and devises and bequeaths to his son, all his estate, real and personal, which shall remain after payment of debts and legacies; the son is the executor, he takes under the will, ample estate, both real and personal, to satisfy all the legacies; he sells the

real, wastes the personal, and dies insolvent. Upon a bill by the daughter against the purchaser of the real estate, and two sons of a deceased surety in the executorial bond, holding estate of the surety, the Chancery decrees:—that the sons should each pay one half of the annuity in arrear, and the costs of suit, reserving liberty to the plaintiff, in case the decree should prove unavailing as to either, to resort to the court for further decree against the other, and ordering the cause to be retained in court for the purpose of taking further accounts as to the annuities to accrue in future. This decree is final, notwithstanding the reservation, from which no appeal can be taken after three [now, five] years from its date. *Thorntons v. Fitzhugh*, 4 Leigh, 209.

37. No decree can be made on matter appearing in answer only. *Eib v. Martin*, 5 Leigh, 132.

38. In a decree against infant heirs, subjecting lands descended to a debt of their ancestor, it is error not to give them a day to show cause against the decree, after their attainment to full age. *Jackson's Adm'x et als. v. Turner*, 5 Leigh, 119. *Sed vide* Code of Virginia, chap. 178, sec. 7.

39. Bill filed by assignees; answers call for proof of the assignment; it is error to decree for plaintiff without such proof. *Tennent's heirs v. Pattons*, 6 Leigh, 196.

40. Every decree which disposes of the whole cause, and leaves nothing further to be done, is a final decree. *Ibid.*

41. Decree cannot be made against a defendant, where the pleadings show no cause against him. *Bank of Virginia v. Craig*, 6 Leigh, 399.

42. The court cannot examine the propriety of a decree made at a former term *inter partes*, nor set aside such decree of a former term, on the ground that it decided matters *coram non judice* at the time. *Ibid.*

43. Upon a bill in Chancery against several defendants, process issues against one not made a party defendant in the bill, and against whom there is no allegation therein, and no relief prayed, and a decree is made against him by default, and against the defendants, by some of whom an appeal is taken to the Court of Appeals, where the decree is reversed as to the appellants, and in all things else affirmed. The decree is a mere nullity as to the party who was not named in the bill, and against whom the bill contained no allegation and prayed no relief. *Moseley v. Cocke*, 7 Leigh, 224.

44. Decree for plaintiff reversed by the Court of Appeals, the allegations of the bill not being proven by competent evidence; but it appearing probable that the defect can be supplied, cause remanded to inferior court, to afford plaintiff opportunity of adducing other proof. *Sittingtons v. Brown et als.*, 7 Leigh, 271.

45. Decree of reversal, where causes have been improperly consolidated, and in one there is defect of appellate jurisdiction, and in the other the decree below is erroneous. *Clairborne v. Gross et als.*, 7 Leigh, 331.

46. The bill of a distributee, besides making the administrator and his sureties defendants, states, that the complainant has understood that the administrator who has gone out of the commonwealth, appointed B. his agent to transact his business in this state, and that he put property or money into B.'s hands to satisfy his debts, but she is not sure that the fact is so, and therefore does not think it just to aver it positively. She makes him a defendant, and calls upon him to state whether he has, or expects to have any such funds, and if any, what. B. dying, and the cause being revived against his executrix, she answers, that her testator, so far from being indebted to the administrator, or having in his hands any of the estate wherewith to satisfy any part of the debt due to the complainant, was himself a creditor of the administrator to a very considerable amount, and that the administrator is still considerably indebted to her as executrix; that she has a lien upon certain slaves, in which the wife of the administrator has an interest at the termination of a life estate, but even this property if it could be sold now, would be insufficient to pay the debt due to her as executrix. An account having been taken, ascertaining the amount due to the plaintiff from the administrator, there ought to be a decree for the same against the administrator and his sureties without delaying the plaintiff for an account to be stated between B. and the administrator. *Moore's Adm'r v. George's Adm'r*, 10 Leigh, 228.

47. A decree for a sum of money provides that if no property of the debtor can be found, other than that conveyed by him by a deed of trust and a mortgage, then he shall deliver up the trust and mortgage property to the marshal, to be sold to satisfy the money secured by the trust and mortgage; and then to satisfy the decree. The debtor dying, a bill of revivor and supplement is filed against the administrator to

obtain payment of the decree out of the assets in his hands. And the administrator, by his answer, relies upon the 17th, and also the 5th section of the statute of limitations, 1 Rev. Code, ch. 128. *Held*,—the decree in this case is not a final decree, and if it were, is not such a one as the statute can apply to. *Hill's Ex'or v. Fox's Adm'r*, 10 Leigh, 587.

48. An interlocutory decree in Chancery, deciding a question of fact in litigation pronounced in the progress of an account, upon exceptions to a report or instructions to a commissioner as to the propriety of items of debit or credit, is *not such a final decree*, as precludes a party from taking new evidence touching the same question of fact without having obtained a review or rehearing of the decree, and without showing that the new evidence had been discovered since the decree. *Dunbar's Ex'ors v. Woodcock's Ex'or*, 10 Leigh, 629.

49. In general, a cestui que trust is not bound by a decree rendered against his trustees in Chancery suit to which the cestui que trust was no party. *Collins v. Lofftus & Co.*, 10 Leigh, 5; *Commonwealth v. Ricks*, 1 Grat. 416.

50. It is error to decree in favor of a person not a party in the cause. *Bailey's Adm'x v. Robinsons*, 1 Grat. 4.

51. A party coming into court, four or five years after a conditional decree, to ask for an award of execution thereon, it is proper for the court to direct an account of subsequent transactions between the parties, and decree accordingly. *Davis v. Crews*, 1 Grat. 407.

52. Decree against an executor will be enforced in a distinct suit against his sureties. *Hobson v. Yancey et als.*, 2 Grat. 73.

53. But the account taken in the suit against executor, to which securities were not parties, may be surcharged by them, or they may demand a new account. *Ibid.*

54. A court of equity can only decree upon the case made by the pleadings, though the evidence may shew that the plaintiff is entitled to further relief. *Munday v. Vawter et als.*, 3 Grat. 518.

55. A decree which disposes of the whole subject in controversy and gives all the relief contemplated and leaves nothing to be done, is a final decree. *Vanmeter's Ex'ors v. Vanmeters*, 3 Grat. 148.

56. A decree which settles all matters in dispute in a cause, but omits to decree upon a claim set up in the bill, but which, after circumstances had rendered unimportant and the plaintiff did not insist upon, is a final decree. *Ruff v. Starke's Adm'r.*, 3 Grat. 134.

57. When a court of equity will decree between co-defendants. *Munday v. Vawter et als.*, 3 Grat. 518.

58. The practice of decreeing between co-defendants will not be extended further than it has already been carried. *Law's Ex'ors v. Sutherland*, 5 Grat. 357.

59. Upon an appeal from an interlocutory decree, the principles of the decree, and not mere informalities in the form thereof, are the proper subjects of consideration in the appellate court. The decree will not therefore be reversed for such errors of form, but will be affirmed without prejudice to the appellant's right to move the court below for a modification of the decree in these respects. *Woodson, trustee, v. Perkins*, 5 Grat. 345.

60. A decree directing land to be sold, unless a sum certain is paid by a day specified, the clerk has no authority to issue execution on the decree, without an order of the court or the judge in vacation; and if an execution is issued on such a decree by the clerk, without authority, the court may quash the execution in term, or the judge in vacation may restrain proceedings thereon by an injunction order. *Shackelford v. Apperson*, 6 Grat. 451. But see Code of Virginia, chap. 186.

61. Though circumstances may exist, which will warrant the court or the judge in vacation to allow process of execution on such an interlocutory decree, these circumstances must be shewn, and if not shewn, it is improper to allow it. *Ibid.*

62. A decree is a lien on the debtor's land; and the creditor may come into equity to subject the land, though the decree has never been revived against the administrator of the debtor, and no execution has issued upon it. *Burbridge v. Higgins' Adm'r.*, 6 Grat. 119.

63. In a bill by a creditor against an administrator and his sureties, charging a devastavit by the administrator, and the liability of the sureties for it, though some of the sureties insist in their answer that, under the circumstances, one of the sureties is liable to the others, if they are liable to the plaintiff, though there is a decree for the plaintiff, and though it appear from the proofs that the devastavit was occasioned by

the payment of a debt of inferior dignity to the surety sought to be charged, yet it is not a proper case for a decree between co-defendants. *Allen & Ervine v. Morgan's Adm'r et als.*, 8 Grat. 60.

64. A decree which passes upon the whole subject in issue, so as to be final in its nature, is not converted into an interlocutory decree by the addition thereto of an order suspending the decree as to the amount of one item of the account involved in the cause, until the decision of another suit brought by another party, against both plaintiffs and defendants in the first suit, in which the amount of this item is claimed by the plaintiff. *Fleming et als. v. Bolling et als.*, 8 Grat. 292.

65. In a suit to marshal assets, the court may in its discretion, decree a sale of lands in the hands of heirs, though some of them are infants; but it is premature to decree a sale before adjudicating the claims of the creditors and so ascertaining the amount of indebtedness chargeable upon the lands of decedent. *Cralle et als. v. Meem et als.*, 8 Grat. 496.

DEMURRER.

1. A demurrer may be considered a plea to the jurisdiction; but, after the demurrer has been overruled, if the answer and other testimony should contradict the allegations of the bill, upon the point conferring jurisdiction; *quære*, whether the court may still consider its jurisdiction sustained, by the implied admission in the demurrer of the truth of those allegations. *Pryor v. Adams*, 1 Call, 382.

2. Admitting with the demurrer that the question concerning the depreciation of paper money was a purely legal one, yet as the appellee was compelled to have had evidence of the amount and date of the bond sued on from the appellant, the bill should be sustained. *Ibid.*

3. When a demurrer to a bill in Chancery is overruled, a decree ought not to be pronounced against the defendant, but leave should be given him to file an answer. *Sutton v. Gatewood et ux.*, 6 Munf. 398.

4. A demurrer to a bill in Chancery against a guardian, for advances of money, &c., by the plaintiff, for the use of the ward, ought not to be sustained on the ground that the ward ought to have been a party; but if, on the answer of the guardian, it should appear proper, the court should then direct the ward to be made a party. *Ibid.*

5. Where a bill in Chancery sets forth various claims, and the defendant files a general demurrer, the demurrer will be overruled, if any of the claims be proper for a court of equity. *Castleman et al. v. Veitch, &c.*, 3 Rand. 598.

6. A defendant in Chancery in Virginia may, at the same time, answer and demur to the same matter in the bill. *Dissentiente Tucker, P. Bassett's Adm'r, &c. v. Cunningham's Ex'ors*, 7 Leigh, 402.

7. If good ground of objection to the discovery sought appears upon the face of the bill, defendant may demur. *N. W. Bank v. Nelson*, 1 Grat. 108.

8. Demurrer to bill to recover land sold for taxes, and purchased by the deputy sheriff, overruled. *Taylor's devisees v. Stringer*, 1 Grat. 158.

DEPOSITION.

See title, "Commissioner's report."

1. A deposition taken after an appeal from an interlocutory decree in chancery may be read on the hearing of the appeal. *Alexander v. Morris*, 3 Call, 89.

2. A deposition taken before the decree was pronounced in the Court of Chancery, but not filed until after an appeal was taken from the decree, was received by the Court of Appeals. *Auditor, &c. v. Pauly*, 5 Call, 331.

3. A deposition taken at a time and place not mentioned in the notice, may be read as evidence; an agent of the party to whom the notice was given, being duly authorized to attend to the taking of such depositions, being present at the time and place appointed, and consenting to the postponement to such other place and time; the commission being in all other respects regularly executed and returned, the court will presume that the person consenting was the authorized agent of the party. *Marshall v. Frisbie*, [an action at law,] 1 Munf. 247.

4. Bill in Chancery by W. M. against S. C. and two others, claiming slaves, and demanding discovery of names, &c., and an account of profits; depositions of aged witnesses are exhibited by the plaintiff, taken in 1794, in an action of detinue brought by him against R. B., to which S. C. was not a par-

ty, to prove the pedigree of the slaves claimed in this suit; and these depositions are read in the Court of Chancery, at three hearings, at very distant intervals, without exceptions. These depositions are competent evidence of general reputation touching the descent of the slaves, if the deponents be now dead, and considering that they were read at the hearing so often, without exception, and the great probability that the deponents are now all dead, the objection to the competency of them cannot avail now in this court. *Tucker, P. dissente* as to the last point. *Colvert v. Milstead's Adm'r*, 5 Leigh, 88.

5. Depositions of witnesses read at the hearing of a suit in equity, without objection, cannot be objected to on the ground of incompetency of the witnesses in the Court of Appeals, on the hearing of an appeal from the decree. *Baxter v. Moore*, 5 Leigh, 219.

6. *Quære*: If the deposition of a witness taken in the Court of Probate, upon the probate of a will, may be read as a part of the sentence of the court, upon the trial of the issue *devisavit vel non* directed by the Chancery court, upon a bill filed to set aside the will. *Coalter's Ex'or v. Bryan et ux. et als.*, 1 Grat., 18.

7. A person taking a deposition under a regular commission and notice, certifies that the deposition was taken before him, with the addition to his name of J. P. It sufficiently appears that he was a justice of the peace. *Pollard's heirs v. Lively*, 2 Grat., 216.

8. If after answer filed and depositions taken, the plaintiff make new parties and file a new bill, the depositions previously taken, cannot be read in evidence against the new defendants; but they might perhaps, if the new defendants were purchasers, *pendente lite*. *Jones v. Williams et al.*, 1 Wash. 230.

9. Depositions taken in a cause relating to the same subject, but not between the same parties, or persons under whom they claim, cannot be read in evidence in a subsequent suit, though the witnesses are dead. (An action at law,) *Rowe v. Smith*, 1 Call, 487.

10. The reasonable notice required by law, on the taking of depositions, must depend on circumstances; thus, if notice was left with the wife of the party, at his dwelling house, when it was known that he was in another State, and when

the notice might have been given him previous to his departure, or as respected the trial of the cause might be postponed till his return ; the notice was held to be insufficient, and the deposition suppressed. *Coleman, Ex'or, &c. v. Moody*, 4 Hen. & Munf. 1.

11. Depositions taken in a suit to perpetuate testimony, are not to be read as evidence in a subsequent suit, unless it appear that the witnesses are dead, or otherwise out of the power of the court. *Lawrence v. Swann et al.*, 5 Munf. 332.

12. If it be stated in the transcript of a decree in Chancery, that "the cause came on to be heard, on the bill, answers and exhibits:" it must be understood to have been in exclusion of the depositions contained in the record, no proof appearing of notice of the time and place of their taking. *Shumate v. Dunbar*, 6 Munf. 430.

13. When the deposition of a party in a suit in Chancery is taken under a special commission, subject to all just exceptions, whether the deposition be excepted against on the ground of incompetency or not, it behooves the court to examine and decide the question of competency: and though the deposition be read at the hearing in the Court of Chancery without exception, yet if on appeal from the decree, the appellate court finds the deposition incompetent evidence, by reason of the deponent's interest in the event, it will pay no regard to the deposition. *Beverly v. Brooke et als.*, 2 Leigh, 426.

14. A deposition should, within the hours appointed by the notice, be opened, at the instance of any party not present when it was taken, for the purpose of cross examining the witness. *Jeter v. Taliaferro et al.*, (action at law,) 4 Munf. 80.

15. Notice of taking depositions is not sufficient, if given to the attorney at law, in the absence of the principal from the state, but ought to be given to the agent or attorney in fact, or if there be none, by publication in the legal manner. *Cahill, Ex'or v. Pintony*, 4 Munf. 371. But by statute a notice may now be given the course of party non-resident. See Sess. Acts 1852, p. 76.

16. A notice to take depositions is insufficient, if it omits the place where the depositions are to be taken ; nor, if the magistrates meet on the appointed day, can they resume the taking of the depositions at any future day, without an adjournment to such day. *Hunter v. Fulcher*, 5 Rand. 126.

17. The deposition of a defendant was taken by his co-defendant, under a special commission awarded by the Chancellor to take the deposition, subject to all just exceptions, and the plaintiff obtains a like special commission to take the deposition of the same party, but does not act under it: *Held*, the plaintiff is not precluded from excepting to the deposition taken by the defendant. *Beverly v. Brooke et als.*, 2 Leigh, 426.

18. A notice is given by plaintiff to defendant, for taking depositions of several witnesses at a specified place in *Missouri*, on six successive days, between certain hours of each day.—Considering the distance of the place appointed for taking the depositions, and the uncertainty of the precise time at which the party would be enabled to have things in readiness for taking them, the notice is sufficiently definite. *Kincheloe v. Kincheloe*, 11 Leigh, 393.

19. Exceptions to leading questions to a witness should be made at the time, if party be present, or by his agent or attorney when depositions are taken. *McCandlish's Adm'r, &c., v. Edloe et als.*, 3 Grat. 334.

20. The caption of a deposition describing it as taken in a proceeding of forcible entry and detainer, is sufficiently accurate to authorize the reading of the deposition, though the proceeding is for an unlawful detainer. *Cales v. Miller et als.*, 8 Grat. 6.

DISCOVERY.

See "Answer." "Interrogatories."

EXCEPTIONS TO ANSWERS.

1. When exceptions are filed to an answer, they must be disposed of before any further proceedings can take place in the cause. *Clark v. Tinsley's Adm'r*, 4 Rand. 250.

2. When the answer of the defendant omits to notice some of the allegations of the bill and replies to others, the allegations not noticed are not considered as admitted, but the plaintiff must except to the answer as insufficient. *Coleman v. Lyne's Ex'or*, 4 Rand. 454.

3. The mode in which an exception to an answer shall point out the omission excepted to, is a matter of practice discretionary with the court and not a subject of appeal. *Craig v. Sebrell*, 9 Grat. 131.

4. If the exception be sustained and the defendant files another answer, there the subject of the exception properly ends. *Ibid.*

INTERPLEADER.

1. S. files a bill of interpleader against A. and B., in order that it may be litigated and determined between them which is entitled to a sum of money in S.'s hands; and the bill is filed in consequence of a demand made on S. by B. for the money; the court holding that A. was entitled to the money in question, decreed that B. should pay A. his costs of suit; and decree affirmed. *Beers, &c. v. Spooner et al.*, 9 Leigh, 153.

INTERROGATORIES.

1. A defect in the charging part of a bill, cannot be supplied by a subsequent interrogatory. *Parker v. Carter et al.*, 4 Munf. 273.

2. An order directing defendant to be brought in to answer interrogatories should be discharged, upon permission being granted him to file his answer. *J. Carr. Jackson's assignees v. Cutright, &c.*, 5 Munf. 310.

3. A defendant in action at law, wishing a discovery, files written interrogatories under the statute, to which answers are given. These answers cannot at the trial be given in evidence by the plaintiff. And when offered as evidence by the defendant the whole must go to the jury, before whom they will not be conclusive, but may be disproved by any other evidence which may be introduced by the defendant. *McFarland v. Hunter*, 8 Leigh, 489; *Vaughn & Co. v. Garland*, 11 Leigh, 251.

4. Case in which a defendant was brought in by a messenger to answer interrogatories. *Johns v. Davis's Ex'or, &c.*, 2 Rob. 729.

5. A party is not bound to answer interrogatories which may subject him to a penalty or forfeiture: and this rule is not confined to cases where the purpose of the action is to enforce the penalty or forfeiture, but extends to those where the discovery itself would expose the party to some action or suit, or any criminal or penal prosecution tending to the like result. *Poindexter, &c. v. Davis et als.*, 6 Grat. 481.

ISSUE OUT OF CHANCERY.

1. The Court of Chancery having directed an issue, the parties waived the trial by jury, and submitted the question to five persons mutually chosen by them, and agreed that their report should be certified in lieu of a verdict. The court must consider such report as an award, and to be governed by the same rules and principles which prevail in cases of awards.—*Pleasants et al. v. Ross*, 1 Wash. 156.

2. When an issue out of Chancery is tried, it is under the superintendence of the court, who will prevent the introduction of improper testimony, and if the verdict be against evidence, will certify this together with the verdict, whereupon the Chancellor will not be satisfied. *Ibid.*

3. The Chancellor will in some cases direct a new trial of an issue upon affidavits proving misbehaviour of the jury afterwards discovered; but not upon affidavits tending to prove that the verdict is contrary to evidence. *Ibid.*

4. If the judge before an issue out of Chancery is tried, certify the verdict to be against evidence, the Chancellor ought not in general to be satisfied with it, but should set it aside. *Southall v. M'Keand et al.*, 1 Wash. 336.

5. When the allegations of the bill are denied by the answer, and not proven by the evidence adduced on the part of the plaintiff, the Court of Chancery on hearing the cause ought to dismiss the bill, and not direct an issue to try the points in controversy. *Pryor v. Adams*, 1 Call, 382.

6. The discretion of a Chancellor, in awarding an issue, is to be exercised on sound principles, of which the Court of Appeals will judge. *Stanard v. Graves et al.*, 2 Call, 369.

7. After three verdicts to the same effect, the Court of Chancery did right in decreeing according to the opinions of the juries. *Ibid.*

8. A court of equity is not bound to grant a new trial, on the judge's certificate that the weight of evidence was against the verdict; especially after two verdicts in favor of the same party. *Ross v. Pines*, 3 Call, 568.

9. Where an issue is directed by the Court of Chancery, to be tried at law, any papers may be read at the trial of such issue, which were read upon the hearing of the cause, or at a former trial. (*Ch. Taylor.*) *M'Call v. Graham et al.*, 1 Hen. & Munf. 13.

10. After two concurring verdicts for the same party, on an issue directed by the Chancellor to be tried at common law, he is not bound to direct a new trial, though both verdicts were in opposition to the opinions of the judges before whom the issues were tried, and a verdict had originally been rendered in favor of the other party. *M' Rae, Ex'or v. Wood's Ex'or*, 1 Hen. & Munf. 548.

11. The court before whom an issue out of Chancery is tried, having been satisfied with the verdict of the jury, and having overruled a motion for a new trial, to which opinion no exception had been taken, the verdict ought forever to remain undisturbed. *Paul et al. v. Paul*, 2 Hen. & Munf. 525.

12. An issue out of Chancery ought not to be directed to try a claim altogether unsupported by testimony, or a title not alleged in the bill, but suggested in the answer without proof; neither is this rule to be varied by the circumstance that infants are interested. *Paynes v. Coles*, 1 Munf. 373.

13. Where the testimony to an important fact is such as to leave it doubtful, the Court of Chancery ought to direct an issue to ascertain it. *Marshall v. Thompson*, 2 Munf. 412; *Bullock v. Gordon, Adm'r*, 4 Munf. 450.

14. Upon a bill of injunction to prevent the sale, under an execution, of slaves devised in trust, if the defendant allege that the *cestui que trust* was entitled to the slaves by five years' possession, before the death of the devisor, and the truth of such allegation be doubtful on the evidence, the Chancellor ought to direct an issue to ascertain that fact. *Galt et al. v. Carter*, 6 Munf. 245.

15. Where a court of equity directs an issue, and the testimony is conflicting the verdict should be conclusive. *Carter v. Campbell*, Gilm. 159. Unless the issue were materially variant from and inapplicable to the question controverted between the parties. *Ibid.*

16. An issue will be directed on satisfactory proof adduced, to try whether a will alleged to be lost, was in fact executed, and what were its provisions. *Brent v. Dold*, Gilm. 211.

17. On a question whether an absolute bill of sale was intended only as a security, the evidence being contradictory, a court of Chancery ought to direct an issue, to try that point. *Knibb's Ex'or v. Dixon's Ex'or*, 1 Rand. 249.

18. Where a court of Chancery has doubts, whether the sale of a horse, or other property, is really intended as a shift to evade the statute against usury, it ought to direct an issue upon *viva voce* testimony, if to be had. *Douglas v. M'Chesney*, 2 Rand. 109.

19. If the evidence on a question of fact in a Chancery suit, though various and conflicting, be such as ought to satisfy the Chancellor's conscience as to the truth of the case, he need not direct an issue to try the fact. *Samuel v. Marshall et ux. et al.*, 3 Leigh, 567.

20. Upon a bill in Chancery for relief against a contract alleged to be usurious, the Chancellor directs an issue to be tried at law, to ascertain whether the contract was usurious or not; jury finds the contract usurious; the judge of the court of law certifies that the verdict, in his opinion, is contrary to evidence; the substance of the evidence is also certified, some of which does not relate to the points put in issue by the pleadings in equity; the Chancellor, being satisfied that the verdict is right, refuses to set it aside, and to order a new trial, and dismisses the bill. It was matter of sound discretion whether the Chancellor should direct the issue, or decide the questions of fact himself, and whether he should set aside the verdict on the issue or not; the verdict was properly refused to be set aside and a new trial ordered; he not being bound in deference to the certificate of the judge of the court of law against it. *Grigsby v. Weaver*, 5 Leigh, 197.

21. A court of Chancery directs issues of fact to be tried at law without evidence regularly taken before the court touching the facts to which the issues relate, but there was evidence which, if regular, would have rendered the order for the issue proper: *Held*, that if the appellate court should set aside the issues for being, in the actual state of the case, improperly ordered, it should, under such circumstances, remand the cause to the Court of Chancery, where the evidence may be regularly taken, and thereupon the issues ordered anew. *Watkins et ux. v. Carlton*, 10 Leigh, 560.

22. Upon a trial at law of issues out of Chancery, exceptions are filed to the opinion of the court, and made part of the record; the court of law certifies the verdict, but it does not expressly certify, nor is it asked to certify, the exceptions: *Held*, all the proceedings upon the trial of the issue, spread upon the record thereof, constitute part of the certificate of the verdict, and with it becomes part of the Chancery record. *Ibid*.

23. On a bill filed to enjoin a judgment on the ground that the debt on which it was founded was for money won by cards, it being doubtful on the evidence, whether such was the consideration; or if it was, whether the plaintiff in the judgment, who was a transferee of the debt, had not been induced to take the transfer of the debt under the belief, induced by the concealment or misrepresentation of the debtor, that the consideration of said debt was good and lawful; the court should continue the injunction and direct an issue to ascertain the facts. *Nelson's Adm'r v. Armstrong et als.*, 5 Grät. 354.

24. When the matter in controversy is of the nature of unliquidated damages, and the accuracy and credit of the witnesses is impeached, an issue should be directed. *Isler & wife v. Grove & wife*, 8 Grät. 257.

MARSHALLING ASSETS.

See "Parties."

ORDER OF PUBLICATION.

1. In a suit in which there is an absent defendant, the decree recites that the cause came on as to him upon the bill, &c., and order of publication duly executed. This is conclusive that the order was duly made, published in the newspaper and posted at the front door of the court-house. *Craig v. Sebrell*, 9 Grät. 131.

PARTIES.

1. Where an attempt is made to subject land in the possession of a purchaser with notice, to an equitable lien, the person under whom such purchaser claims, or his legal representatives, ought to be parties to the suit. *Wilcox v. Calloway*, 1 Wash. 38.

2. If A. gives a mortgage to C. to indemnify him against his endorsement for A., a bill of *quia timet* may be brought by C. against A.'s representatives, for a decree that they shall pay B., and indemnify C. against his endorsement; but B.'s representatives must be made parties to the suit. *Call v. Scott et al.*, 4 Call, 402.

3. The heir, legatee or distributee, must either bring the executor or the administrator of the decedent before the court, or administer himself, without which he cannot sustain a bill for an account of the effects of the decedent, for it is not sufficient

to allege that the rights of his predecessors are all united in him, as there may be outstanding claims to adjust. *Moring v. Lucas et al.*, 4 Call, 577.

4. In a suit in equity against a mercantile firm, the executors of the deceased partners ought to be made parties. *Carter's Ex'or v. Currie*, 5 Call, 158.

5. In bills in Chancery, brought for discovery, and for a conveyance of land or other estate, all persons interested in such land or other estate, ought to be made parties. *Key's Ex'ors v. Lambert*, 1 Hen. & Munf. 330.

6. A person losing a public certificate bearing interest, which never was transferred to him by actual assignment from the original holder, ought not, by a suit in Chancery, to obtain its renewal from the commonwealth, without making the original holder a party to the bill. *Auditor v. Johnson's Ex'x.*, 1 Hen. & Munf. 537.

7. A bill was filed in behalf of certain infants, against the heirs of their guardian who died intestate, the sheriff to whom his estate was committed, (no administrator having qualified,) his surviving surety in the bond given for the performance of his duty as guardian, and the administrator of the other surety, as co-defendants. No process having been served on a part of the heirs, nor on the surviving surety, a decree against the administrator of the deceased surety was held to be erroneous, because there were not proper parties convened before the court, and the cause was remanded for farther proceedings. *Bland's Adm'r v. Wyatts*, 1 Hen. & Munf. 543.

8. After a judgment against an executor, and a return of "no effects," on an execution against the goods and chattels of his testator, a suit in equity may be brought for a discovery of the assets; to which suit, the securities of the executor, and all other persons, (however remotely concerned in interest,) against whom a decree can be rendered, ought to be made defendants. (Ch. Taylor,) *Clarke v. Webb et als.*, 2 Hen. & Munf. 8.

9. If a derivative purchaser, by assignment of a title bond, file his bill against the vendor for specific performance, the first purchaser or his representatives ought to be made parties. *Hoover v. Donally et als.*, 3 Hen. & Munf. 316.

10. The vendee or his legal representatives ought to be parties to a suit in Chancery, brought by the vendor against a subsequent purchaser, to recover a balance alleged to be due from the vendee. *Duval v. Bibb*, 4 Hen. & Munf. 113.

11. In a suit for contribution against legatees or distributees, the executor or administrator, or, if he be dead, the person who succeeded him in the executorship or administration, ought to be made a party; unless it appear that the account of such executorship or administration has been regularly made up, and the estate thereupon delivered over to the legatees or distributees. *Hooper et ux. v. Royster et ux.*, 1 Munf. 119.

12. In a suit in Chancery to recover a tract of land, against a vendee, on the ground that the vendor had previously agreed to convey the same land, in a certain event, to the plaintiff, it seems, that the vendor, or his legal representatives ought to be parties. *Lewis v. Madisons*, 1 Munf. 303.

13. If it appear, on the face of the record, that proper parties to the suit are wanting, the decree will be reversed, unless the objection was expressly relinquished in the court below. *Sheppard's Ex'or v. Starke et ux.*, 3 Munf. 29.

14. In a suit in Chancery, in behalf of a person who claimed a share of a residuum, as purchaser from one of the legatees, the administrator *de bonis non*, and children of the testator were defendants to the bill; but proceedings were had against two of them only, viz: the legatee of whom the plaintiff purchased, and another, who also claimed the same share by a pretended purchase:—it appearing that, by a decree in a suit in behalf of the administrator *de bonis non*, a division among certain persons as residuary legatees, had been directed, and one of the defendants now before the court, had been ordered to pay to the other the share in question: yet it was determined that proceedings should have been had against all the defendants; and the cause was remanded to the court below for that purpose. *Purcell v. Maddox*, 3 Munf. 79.

15. A judgment at law being obtained against one of two obligors in a joint and several bond, and no proceedings to enforce it appearing, a court of equity ought not to charge the lands of the other obligor in possession of his devisees, without having made the obligor against whom the judgment was rendered, or his representatives, parties to the suit. *Foster et ux. v. Crenshaw's Ex'ors*, 3 Munf. 514.

16. A decree cannot be made against a widow, (restraining her from conveying her right of dower,) in a suit to which she is not a party as widow, but only as administratrix of the decedent, and guardian of her children. *Pennington v. Hanby*, 4 Munf. 144.

17. It is error to render a joint decree against two co-executors, when only one is before the court. *Myrick v. Adams*, 4 Munf. 366.

18. On a bill to surcharge and falsify an executor's account, the legatees as well as the executor being defendants, if the plaintiff direct the cause to be set for hearing after the executor has answered, but before the process against the legatees has been served, and the cause be heard on the merits; he cannot object to the want of proper parties, or that the decision was premature. *Wyllie et ux. v. Venable's Ex'or*, 4 Munf. 369.

19. The court's dismissing a bill in Chancery, as to parties who have not answered, and on whom a decree *nisi* has not been served or published according to law, was error. *Henderson v. Anderson's Ex'x et als.*, 4 Munf. 435.

20. On the hearing of a suit in Chancery, if it be discovered that the cause is not matured for hearing as to some of the defendants, against whom the plaintiff appears to have a claim in equity, the bill ought not to be dismissed upon the merits; but only as to those defendants against whom there is no equity: as to the other defendants, it should be sent back to the rules for farther proceedings; notwithstanding the plaintiff may have been negligent, and the cause was prematurely set for hearing on his motion. *Key v. Hord et als.*, 4 Munf. 485.

21. The officer who returned the writ and bail bond ought, as well as the plaintiff at law, to be made a party defendant to a bill of injunction filed by the person returned as bail, who denies that he ever executed the bond; for the officer is interested in the question in controversy, and should be a party, that final and complete justice may be done. *Spottswood v. Higginbotham*, 6 Munf. 313.

22. A testator devises certain real property to be sold, and the proceeds to be divided in different proportions among several legatees, and appoints two executors, both of whom unite in the sale of the said property: one of the legatees assigns his interest in the legacy to a third person; the assignee brings his suit in Chancery against one of the executors only, and without making the other legatees interested in the sale of the said property, parties: on both grounds it is error in court to render a decree in favor of the plaintiff. The court should also have an account of the sales of the said lands be-

fore rendering a final decree for any particular sum, notwithstanding the defendants have not answered the bill, and it is taken *pro confesso*. *Findlay Ex'or v. Sheffey*, 1 Rand. 73.

23. Where land is sold under a deed of trust, and the debtor impeaches the sale, he must make the purchaser a party as well as the creditor. *Chowning v. Cox et al.*, 1 Rand. 306.

24. All persons materially interested in the subject of controversy ought to be made parties in equity, and if they are not, the defect may be taken advantage of either by demurrer, or by the court at the hearing. *Clark v. Long*, 4 Rand. 451.

25. Therefore the purchaser of an equity redemption, cannot file a bill to redeem against the mortgagee, without making the mortgagor a party. *Ibid.*

26. The distributees of a deceased person, may maintain a bill in equity to impeach and set aside a deed of gift of personal estate made by the decedent in his life-time, as fraudulent, and the court may at their suit declare the deed fraudulent and annul it; but the subject itself can only be decreed to the personal representative of the deceased, or to the distributees, in a case in which the personal representative is a party. *Samuel v. Marshall et ux. et al.*, 3 Leigh, 567.

27. On a bill in State Court of Chancery, by a creditor, by specially binding the heirs of the debtor, against the heirs, to subject the lands descended to the debt; it appears that these lands have been sold, under a decree of the Federal court, to satisfy debt of their ancestor, to the United States, as collector of customs, before the hearing of this cause. The purchasers under the decree of the Federal court ought as such, to be made parties to this suit. *King, Adm'r, &c. et als. v. Ashley*, 5 Leigh, 408.

28. In what case Chancery suit should be revived in the name of the executor. *Ruffners v. Lewis's Ex'ors et als.*, 7 Leigh, 720.

29. The creditor of a firm obtains judgment against the surviving partner, who dies, and his personal assets are exhausted by the administrators in paying other claims. The creditor files a bill in equity against the administrators and heirs of the surviving partner and the representatives of the deceased partner. The bill seeks a decree for the sale of lands owned by the surviving partner and the firm, and when this fund is

exhausted, seeks to charge the representatives of the deceased partner. The representatives of the deceased partner were rightly made parties. *Jackson v. King's representatives*, 8 Leigh, 689.

30. Distributees of a decedent may maintain a bill in equity to assert their rights in the decedent's estate, though they cannot have distribution thereof without having the executor or administrator of the decedent before the court as a party in the cause. *Hansford, &c. v. Elliott, &c.*, 9 Leigh, 79.

31. After judgment recovered by vendor against two joint vendees of land for a balance of the purchase money, one of the vendees dies, and the other brings suit in equity against the vendor, for deficiency in land. The representatives of the deceased vendee should be before the court. *Dissentiente Stanard, J. Crawford et al. v. M' Daniel*, 1 Rob. 448.

32. In a suit by judgment creditor, to subject lands in the hands of a *bona fide* purchaser from the debtor, pending the suit the purchaser dies; his heirs are necessary parties. *Taylor's Adm'r et als. v. Spindle*, 2 Grat. 44.

33. To a bill filed to subject the real assets in the hands of the heirs to satisfy a debt of the ancestor, the administrator is a necessary party. *Beale's Adm'r v. Taylor's Adm'r et als.*, 2 Grat. 532.

34. In suit by an insolvent debtor, to compel payment of the whole amount of an incumbrance stated to be due at the time of sale of his equitable interest in property surrendered by him, the creditors in the execution are necessary parties. *Tiffany v. Kent et als.*, 2 Grat. 231.

35. In a suit in equity by the claimant of an incumbrance against a vendee having notice, a person who joined the vendor in the deed for the purpose of relinquishing a collateral claim, need not be a party. *Blair v. Owles*, 1 Munf. 38.

36. On a bill of injunction exhibited by the administrator of a purchaser of a tract of land, against the administrator and heirs of the vendor (in whom the legal title still remains,) claiming compensation for a deficiency, and credits for payments, and a conveyance; the court, on allowing the compensation and the credits, may decree that the defendants shall convey their title to certain trustees, to be by them conveyed to the heirs of the purchaser, (though not parties to the suit,) if the balance of the purchase money be paid on or before a certain day; and if not, with power to sell as much of the land

as may be sufficient to pay such balance, and to convey the residue, if any, to the said heirs. *Humphrey's Adm'r v. M'Clenachan's Adm'r and heirs*, 1 Munf. 493.

37. Where the division of a testator's estate, in pursuance of his will, is not to be made at one and the same time, but at the several periods when any one or more of his children shall separate from the family, it is not necessary that all the legatees be made parties to each suit in Chancery for a division, but only those entitled to participate in the division then in question. *Branch's Adm'r v. Booker's Adm'r*, 3 Munf. 43.

38. A debtor, holding an equitable title to land, having conveyed it by deed of trust to secure a creditor, and having afterwards caused a conveyance of the legal title to be made to another creditor, who had notice of the prior deed, need not be a party to a bill in equity exhibited by the *cestui que trust* to compel a conveyance of the legal title, and performance of the trust. *Lambert v. Nanny*, 2 Munf. 196.

39. Prior to the act of 1786, concerning partitions and joint rights and obligations, two men, who were partners in a drove of cattle, applied part thereof to a joint purchase of a settlement right to land; and one of them died: the survivor had the land surveyed by virtue of a land office treasury warrant, and sold it to a third person, who, having notice of the partnership right, obtained a grant of the whole from the commonwealth: a purchaser from the heir of the deceased partner was, nevertheless, entitled, in equity, to his share of the land. *Edgar v. Donally & Jones*, 2 Munf. 387.

40. In such case, the surviving partner, and the purchaser from him, being defendants to the bill, the heir of the deceased partner is not a necessary party; a deed from him, conveying all his right to the plaintiff, being produced. *Ibid.*

41. Where a plaintiff in equity having the equitable title to land, sues for the legal title, the person holding such legal title, is a sufficient defendant, without making the person of whom he purchased a party to the suit. *Mayo v. Murchie*, 3 Munf. 358.

42. If the sheriff, after taking a forthcoming bond, accept the same goods from the defendant, in discharge of his body from another execution, and prevent the surety in such bond from delivering them on the day of sale therein appointed; a court of equity, on a bill for discovery and injunction, exhibited by the surety, will require the sheriff and all parties con-

cerned, to answer a charge of fraud and combination, and (whether fraud be established or not) will perpetually enjoin a judgment rendered against the surety upon the forthcoming bond, as unconscionable against him; leaving the plaintiff, in that judgment, to his remedy against the sheriff, and the sheriff to his remedy against the person who indemnified him, or to whom, by mistake, or in his own wrong, he paid the money in satisfaction of the second execution. *Lusk v. Ramsay*, 3 Munf. 417.

43. The plaintiff in the second execution, to satisfy which the sheriff improperly sells the goods, need not be a party to such suit in Chancery; because the surety in the bond wants no decree against him. *Ibid.*

44. If a testator devise to his widow "her living," upon a tract of land, during her life, and the same land to one of his sons in fee-simple; a bill in equity lies for partition of the land among the heirs of that son, in the widow's lifetime, and without making her a party, for the decree will be made "subject to her rights." *M'Clintic et al. v. Manns*, 4 Munf. 328.

45. An injunction of a Court of Chancery inhibiting the defendant and all other persons, from selling certain slaves until the further order of the court, is conclusive, while in force, to prevent their being lawfully sold to satisfy an execution against him, even in favor of the person not a party to the suit in Chancery. *West v. Belches*, 5 Munf. 187.

46. In a court of equity a plaintiff may be decreed to execute a release and to procure a third person, (under whom he claims,) to join him therein, without making such person a party to the suit. *Moon v. Campbell*, 1 Munf. 600.

47. The assignee of a mortgage may maintain a suit to foreclose, without making his assignor a party, if the legal title has been conveyed to him. *Newman v. Chapman*, 2 Rand. 93.

48. Suit in which an heir of personal representative not a necessary party in suit by legatee. *Dabney's Adm'r, et als. v. Smith's legatees*, 5 Leigh, 13.

49. Eight years after the death of an intestate who had no child, his widow files a bill in equity to recover her moiety of his personal estate, without making any other distributee a party. The bill states that to the other moiety the decedent's brother G. became entitled, he being his only re-

lation by consanguinity in the United States, the decedent being a native of *Ireland*, and the administrator fully satisfied and paid off the said G. his share of the estate; afterwards G. left this country, and either died, or, if living, it is not known where he is. This statement is not objected to, or controverted, until after a decree in favor of the widow against the administrator and his sureties, when the decree is appealed from, and the objection is made for the first time in the Court of Appeals. The statement in the bill respecting the next of kin must be taken as true, and the objection is therefore untenable. *Moore's Adm'r v. George's Adm'r*, 10 Leigh, 228.

50. Slaves emancipated by will, need not be made parties to a bill contesting it. *Coalter's Ex'or v. Bryan et ux., et als.*, 1 Grat. 18.

51. Justices who appoint a guardian, and take insufficient security from him, are not proper parties to a suit for the settlement of his guardianship account; nor is the clerk taking such bond, a proper party. *Austin v. Richardson*, 1 Grat. 310.

52. Bill charges that a person through whom defendant received money, sought to be recovered, disclaimed any interest in it, and directed defendant to deliver it to plaintiff. Bill demurred to—such party not a necessary party. *Northwestern Bank v. Nelson*, 1 Grat. 108.

53. Where a person has a mere interest in the question involved in a suit in equity, arising out of a collateral liability, though the decree may upon that question, be evidence for, or against him in some future controversy, such interest does not render him a necessary, or a proper party. *Austin v. Richardson*, 1 Grat. 310.

54. A will was dated in 1802, the testator died in 1815.—In 1827, the creditors of one of the administrators filed a bill to subject his property conveyed in trust to indemnify his sureties in his administration bond, to the payment of his debt. The legatees in the will not being heard from up to that time, are not necessary parties. *Jones v. Lackland et als.*, 2 Grat. 81.

55. In a contest about a will, a person, who was not a party in the county court, may, by becoming interested after an appeal to the district court, be admitted a party there, and carry up the cause to the Court of Appeals; but, on reversing the

judgment of the district court, and affirming that of the county court, such party can only recover the costs in the district court. *Cogbill v. Cogbill*, 2 Hen. & Munf. 467.

56. On an appeal from an interlocutory decree, if proper parties to the suit appear to be wanting, the Court of Appeals will not leave it to the Chancellor, but will itself direct such parties to be made. *Hooper et ux. v. Royster et ux.*, 1 Munf. 119.

57. It is the course of a court of equity to decree in the first instance against the party who is ultimately responsible, but this is done only where the parties are before the court at the time of the decree, and their several liabilities are clearly ascertained. *Garnett &c., v. Macon et al.*, 6 Call, 308.

58. A court of equity ought not to dismiss a bill absolutely for want of proper parties, the plaintiff showing enough to give color to his claim for relief against the parties not before the court; in such case the Chancellor is right in giving the plaintiff leave to amend and make the proper parties — *Allen et al. v. Smith*, 1 Leigh, 231.

59. If one person to whom alone the right asserted in a bill in Chancery appertains, and other persons who have no right, join in the bill, and the cause be proceeded in to a decree in the Court of Chancery, without any objection there to the joining of improper parties plaintiffs in the bill; upon appeal from the decree to the Court of Appeals, the objection will have only this effect in the appellate court, that the court will consider the right as vested in the plaintiff entitled thereto, and affected by his acts or omissions. *Dickensons v. Davis et al.*, 2 Leigh, 401.

60. A defendant in equity is charged as executrix and as devisee of a decedent; in the caption of her answer, she professes to answer only as executrix; but in the body of her answer she in fact answers as devisee: *Held*, such answer places her before the court in her character of devisee. *Kinney's Ex'or v. Harvey, &c.*, 2 Leigh, 70.

61. Decree by default against defendants, who were not in contempt upon any proper process, reversed for this irregularity. *Frazier, &c. v. Frazier's Ex'ors, &c.*, 2 Leigh, 642.

62. On an appeal from an interlocutory decree, correct on the merits, but erroneous for want of proper parties, the court will reverse the decree, but allow the appellees to recover costs, as the parties substantially prevailing; because an appeal from

PARTIES:

an interlocutory decree is only given to prevent the payment of money, or change of property, or to settle principles. *Cunningham v. Patterson*, 3 Rand. 66.

63. Want of proper parties to bill for setting aside will, is no ground to reverse decree of dismission right on the merits. *Dissentiente, Tucker, P. Kincheloe v. Kincheloe*, 11 Leigh, 393.

64. In a suit by a judgment creditor to subject lands in the hands of a *bona fide* purchaser from the debtor, pending the suit, the purchaser dies, his heirs are necessary parties. *Taylor's Adm'r et als. v. Spindle*, 2 Grat. 44.

65. A slave claiming a right to freedom is not a necessary party in a controversy between third persons, though his right to freedom may be involved in the controversy. *M' Candlish, Adm'r v. Edloe et als.*, 3 Grat. 330.

66. A bill should not be dismissed for defect of parties, if plaintiff has shewn himself entitled to relief on the merits; but he should be allowed to amend his bill and make the necessary parties. *Jameson's Adm'r v. Deshields*, 3 Grat. 4.

67. All the persons secured by a deed of trust, either directly or indirectly, who are named in it, are necessary parties to a bill assailing the trust deed as fraudulent as to some of the cestuis que trust, and seeking a distribution of the trust fund. *Billups v. Sears et als.*, 5 Grat. 31.

68. In a suit brought by a trustee of a married woman, to assert and defend her rights, in which a full opportunity is afforded the cestui que trust to protect her rights, it is not necessary that she should be made a party. *Woodson, trustee v. Perkins*, 5 Grat. 345.

69. One of two administrators having taken no active part in the administration and having died, his administrator is not a necessary party to a bill filed by the distributee of the intestate for an account of the administration of the estate. *Will's Adm'r v. Dunn's Adm'r*, 5 Grat. 384.

70. The widow of the intestate having received her third of the estate and died, her administrator is not a necessary party to a suit by the only child of the intestate to recover his proportion of the estate from the administrator. *Ibid.*

71. Legatees having been in possession of slaves for nearly five years, may file a bill to enjoin the sale of them under ex-

ecution against a third person, without making the executor a party, though it does not appear he ever assented to the legacy. *Kelly v. Scott*, 5 Grat. 479.

72. Though a deed of trust secures creditors in several classes, one or more may sue for the benefit of all, to have the trusts executed, where the trustees refuse to act. *Reynolds v. The Bank of Virginia, et als.*, 6 Grat. 174.

73. To a bill to set aside fraudulent conveyances made by an insolvent debtor, the trustees and cestuis que trust in the deeds, the sheriffs of the counties in which the lands lie and the execution creditors interested in the property, should be parties. *Clough, &c. v. Thompson*, 7 Grat. 26.

74. In a suit by residuary legatees against the executor for a distribution of the estate, the specific legatees should be parties, unless it appears that their legacies have been paid. *Nelson's Ex'or v. Page et als.*, 7 Grat. 160.

75. In a creditor's suit either by foreign attachment or to marshal assets, against heirs residing abroad, the lands descended having been sold under a decree at the suit of the heirs, and the proceeds being in the hands of a commissioner, he should be a party as such; and his being a party as administrator of the deceased debtor is not enough. *Carrington et als. v. Didier, Norvell, & Co.*, 8 Grat. 260.

76. In a bill by persons claiming to be legatees or assignees of legatees, against defendants as legatees or assignees of legatees, under the same will, for distribution of the slaves bequeathed to the legatees jointly, the presumption is, in the absence of all pleadings and proofs to the contrary, that the persons made parties to the suit as legatees are not fictitious persons or mere pretenders to the characters assumed in the proceedings. *Ball et als. v. Johnson's Ex'or, et als.*, 8 Grat. 281.

77. In a case last above cited, the case being a proper one upon its merits for distribution of the subject among those entitled thereto, the bill should not be dismissed for want of parties or of proof that the parties were what they professed to be; but the court should direct the plaintiffs to amend their bill and make the proper parties. *Ibid.*

78. A personal representative of a deceased insolvent obligor is not a necessary party to a suit in equity by the executrix of the obligee against the administratrix of one of the

obligors, to enforce payment of the bond, so as to require the plaintiff to have one appointed and make him a party. *Montagues' Ex'x. v. Turpin's Adm'x*, 8 Grat. 453.

79. All the sureties of an executrix should be parties to a suit by legatees for distribution, or a sufficient excuse should be shewn for failing to make them parties, before a decree is made against one of them. *Hutcherson, &c. v. Pigg*, 8 Grat. 220.

80. L. buys lands of D. and T. and gives to each his bonds for his share of the purchase money. The contract is afterwards rescinded, but before this is done, D. assigns one of the bonds. On a bill to enjoin a judgment recovered on this bond by the assignee, T. is not a necessary party. *Drake v. Lyons*, 9 Grat. 54.

81. A bill is filed to subject lands to the satisfaction of a judgment, after the death of the debtor and charges fraud in certain conveyances from the debtor to his son. The son having conveyed some of the lands to third persons, all such persons must be made parties. *Henderson v. Henderson's Ex'x.*, 9 Grat. 394.

82. In a bill by a surety whose principal is dead, to compel his executor to pay the debt. The creditor is a necessary party. *Stephenson v. Taverners*, 9 Grat. 398.

83. A bill to marshal assets and for administration should be in behalf of all the creditors and the heirs and devisees should be parties. *Ibid.*

84. In general one distributee cannot maintain a suit to recover his distributable share of the estate, without making the other distributees parties. *Sellings et als. v. Bumgardner, guardian*, 9 Grat. 273.

REVIVOR.

1. A suit in Chancery for a conveyance of land, if the defendant die before a final decree, ought to be revived against his heirs and devisees, and all other persons holding, claiming, or in any manner interested, under him, in the land in question. *Key's Ex'ors v. Lambert*, 1 Hen. & Munf. 330.

2. An appeal having abated at one term, by the death of the appellant, at the next term a *scire facias* was awarded on the motion of his administrator, (who qualified since the abatement,) for the appellee to show cause why the appeal

should not be revived. *Gibbs v. Perkinson*, 2 Hen. & Munf. 211.

3. An appeal having abated at March term by the death of the appellant, a *scire facias* to revive it may be awarded at the ensuing October term. *Buster v. Wallace*, 3 Hen. & Munf. 217.

4. Where the appellee dies, the court will not take up the appeal in the name of the executors, without giving the appellant notice by a *scire facias*, especially where a great length of time has elapsed since the appeal. *Scott v. Adams*, 3 Hen. & Munf. 501.●

5. An appeal from, or *supersedes* to, an order quashing an execution against two defendants, need not, if one of them die, be revived against his representative, but should be proceeded on as to the other only. *Bullit's Ex'ors v. Winstons*, 1 Munf. 269.

6. Pending a suit against the committee of an insane person, if the latter die, and a *sci. fa.* to revive the suit be issued against his administrators, who thereupon appear by counsel, and go to trial on the issue joined between the plaintiffs and the committee, they cannot take an objection in the appellate court, that the suit ought not to be revived against them. *Paradise's Ad'ors v. Cole et al.*, 6 Munf. 218.

7. *Quære*: Whether a suit against the committee of an insane person may not properly be revived against the administrators of such person, in the event of his dying during its pendency. *Ibid.*

8. Four plaintiffs in equity unite in the same bill, praying an injunction to stay proceedings on four several judgments at law against them, respectively, on grounds of equity common to all; the bill is exhibited against five parties, defendants; the injunction awarded; pending suit, two of plaintiffs and three of defendants die, and Chancellor makes an order, that unless living plaintiffs, and representatives of deceased plaintiffs, revive the injunction, in name of representatives of deceased plaintiffs, against representatives of deceased defendants, on or before a given day, the injunction shall stand and be dissolved: this order is irregular and erroneous. *M'Kays v. Hite et al.*, 2 Leigh 145.

9. When bill for partition should be revived in name of executor, instead of the heir of the plaintiff. *Ruffners v. Lewis's Ex'ors, et als.*, 7 Leigh, 720.

10. After a decree ascertaining the rights of the plaintiffs in respect to the land, and after partition made and a conveyance directed to L. of the moiety sued for, he died; *Held*: that as the suit was then proceeded in for the rents and profits only, to which the executors of L. were entitled, it was proper to revive it in their names and not in the names of the heirs of L." *Ibid*.

SEQUESTRATION.

1. A sequestration is proper, if the defendant obstinately lies in jail to save his estate or exhausts it in paying other creditors, to the injury of the plaintiff. *Ross v. Colville & Co.*, 3 Call, 382.

SUPPLEMENTAL BILL.

1. After publication of depositions, and the cause set down for hearing the original bill cannot be amended by making new parties, or charging a new fact, but a supplementary bill may be offered. (*Ch. Taylor.*) *Pleasants v. Logan*, 4 Hen. & Munf. 489.

III.

Summary of decisions affecting questions of Equity pleading and practice in the Circuit Courts of the United States, made by the United States Supreme Court.

ANSWERS.

See title "Bills."

1. The weight of an answer by a corporation, under their corporate seal, is very much lessened, if not wholly destroyed, by not being under oath. *Union Bank v. Geary*, 5 Pet. 99.

2. Where a bill charges the defendant with notice of a particular fact, an answer must be given without a special interrogatory; but a defendant is not bound to answer an interrogatory, not warranted by some matter contained in a former part of the bill. *Mechanics Bank v. Lynn*, 1 Pet. 376.

BILLS.

See title "Discovery."

1. The material facts on which a complainant relies for relief must be so alleged in his bill as to put them in issue, or the relief cannot be granted, though the facts be proved. *Harding v. Hardy*, 11 Wheat. 103.

2. No admissions in an answer to a bill in chancery can, under any circumstances, lay the foundation for relief under any specific head of equity, unless it be substantially set forth in the bill. *Jackson v. Ashton*, 11 Pet. 229.

3. No relief can be given unless a proper case be made in the bill, and supported by proof. *Knox v. Smith*, 4 How. 298.

4. Where a bill is filed to recover an interest in lands in Ohio by one claiming under a will made and proved in another State, it must appear on the face of the bill, that the will has been proved and recorded in Ohio, according to the requisitions of the statutes of that State in such cases, in order to give the same validity and effect to the will, as if made in Ohio. *Kerr v. Moon*, 9 Wheat. 565.

5. A court of equity cannot act upon a case which is not fairly made by the bill and answer; but it is not necessary that these should point out in detail the means which the court should adopt in giving relief under the general prayer for relief, beyond the specific prayer, and not exactly in accordance with it. *Walden v. Bodley*, 14 Pet. 156.

6. Where a case for relief is made by the bill, it may be given by imposing conditions on the complainant, consistently with rules of equity in the discretion of the court. *Ibid.*

7. The party may frame his bill with a double aspect so that if the court decide against him upon one view of the case it may afford him relief in another. *Hobson v. McArthur*, 16 Pet. 195.

8. In general terms, a bill is said to be multifarious which seeks to enforce against different individuals demands which are wholly disconnected. *Gaines v. Chew*, 2 How. 619.

9. As to what constitutes multifariousness, it is impossible to lay down a general rule; every case must be governed by its own circumstances, and the court must exercise a sound discretion on the subject. *Gaines v. Chew*, 2 How. 619; *Oliver v. Piatt*, 3 How. 333.

10. Where a bill was filed against executors, denying the authority of the executors to act as such in the premises, and to recover property sold by them as such, it was held, that the bill was not multifarious, because the purchasers of such property were made co-defendants with them. *Gaines v. Chew*, 2 How. 619.

11. So it is improper to pray for an account by the executors alone in such bill. *Ibid.*

12. The objection of multifariousness cannot, as a matter of right be taken by the parties, except by demurrer, or plea or answer; and if not so taken, will be deemed to be waived and cannot be insisted on at the hearing. *Oliver v. Piatt*, 3 How. 333.

13. But the court itself may make the objection where it is necessary and proper to the due administration of justice; though it will not, where it can get on to a final decree without embarrassment; the objection cannot be taken in an appellate court. *Ibid.*

14. Relief will not be given on the ground of fraud unless it be made a distinct allegation in the bill, so that it may be put in issue in the pleadings. *Patton v. Taylor*, 7 How. 132.

15. A court of equity has jurisdiction of a bill against the administrator of a deceased debtor, and a person to whom real and personal property was conveyed by the deceased debtor for the purpose of defrauding creditors. *Hagan v. Walker*, 14 How. 29.

16. Where, on a bill for discovery and relief, a discovery is obtained, but the court has not jurisdiction to grant relief, there being a complete remedy at law, it is proper to dismiss the bill in respect to the relief prayed, but it should be without prejudice to the rights of the parties at law. *Horseburgh v. Baker*, 1 Pet. 232.

17. Under the prayer for general relief in a bill, such relief only can be granted as the case stated in the bill, and sustained by the proof, will justify. *Hobson v. McArthur*, 16 Pet. 182.

18. The dismissal of a bill to enforce a specific performance of a contract for the sale of land, where the vendor can make a good title, is a bar to a new bill, for the same object. *Hepburn v. Dunlop*, 1 Wheat. 179.

COMMISSIONERS.

See title "Masters in Chancery."

DECREES.

1. Where a joint liability is asserted in a court of equity, the decree must be made against all the parties before it, who do not show some personal discharge. *Mandeville v. Riggs*, 2 Pet. 482.

2. A decree directing certain acts to be done to enable a party to execute certain duties assigned to him, and dismissing the bill, is erroneous, as it places the cause out of the power of the court; and it is no answer to such objection, that the acts ordered have been performed. The error is in the decree. *Greenleaf v. Queen*, 1 Pet. 138.

3. In rendering a decree in chancery, the rights of the parties at the time are to be considered, and not as they were at the time of the institution of the suit. *Randel v. Brown*, 2 How. 406.

4. Where it appears by the final decree that all the exceptions taken to the report of a master were disposed of, being allowed or disallowed, this is sufficient, though it does not ap-

pear that they were formally allowed or overruled. *Oliver v. Piatt*, 3 How. 333.

5. It is a settled rule that a decree must conform to the allegations in the pleadings, as well as to the proofs in the cause. *Crocket v. Lee*, 7 Wheat. 522.

6. But where on appeal it appears that the decree is erroneous in this respect, and it also appears that it may be correct on the merits, the cause will be remanded with directions that the parties be permitted to amend their pleadings. *Crocket v. Lee*, 7 Wheat. 522.

7. A complainant in equity cannot obtain a decree for more than he has asked in his bill. *Simms v. Guthrie*, 9 Cranch. 19.

8. A verdict and judgment in a court of common law, or a decree of a court of equity, is conclusive between the same parties upon the same subject matter. *Hopkins v. Lee*, 6 Wheat. 109; *Bank of United States v. Beverly*, 1 How. 134.

9. And it makes no difference that the judgment or decree is an affirmance by a divided court. *Washington Bridge Co. v. Stewart*, 3 How. 413.

10. How far a decree in a former case, the record of which is made proof in the case before the court, is binding, so far as relates to proof of exhibits, upon those defendants who are neither parties, privies, nor *pendente lite* purchasers. See *Kerr v. Watts*, 6 Wheat. 550.

11. A decree dismissing a bill generally, may be set up in bar of a second bill having the same object in view; but a dismissal on the ground that the court had not jurisdiction, showing that no decision was had on the merits, will not bar a subsequent suit. *Walden v. Bodley*, 14 Pet. 156.

12. Where the answer to a bill sets up the dismissal of a former bill by the same complainant against the same defendant, praying the same relief, but the record in the former case is not set out nor exhibited, it cannot avail. *United States Bank v. Beverly*, 1 How. 134.

13. A decree of foreclosure and sale of the premises, in a bill to foreclose a mortgage, is a final decree; and a sale under the decree after the death of a defendant, without a revival of the suit, is not an error for which the decree will be reversed on a bill of review. *Whiting v. Bank of United States*, 13 Pet. 6.

14. In equity, a final decree, or an interlocutory decree, which decides, to a great extent, the merits of a cause, ought not to be made until all the parties to the bill, and all parties in interest, are before the court. *Conn v. Penn*, 5 Wheat. 424; *Marshall v. Beverley*, 5 Wheat. 313.

15. But this equitable rule is made by the court itself, and is subject to its discretion; and if a case may be completely decided as between the litigant parties, the circumstance that an interest exists in some other person whom the process of the court cannot reach, as if he be a resident of another State, ought not to prevent a decree upon the merits. *Elmendorf v. Taylor*, 10 Wheat. 152; *Marr v. Southwick*, 2 Porter, 351; *Wiser v. Blackly*, 1 John. C. R. 437.

16. It is the settled practice in the courts of the United States, if the suit can be decided on its merits, between those who are regularly before them, although other persons, not within their jurisdiction, may be collaterally or incidentally concerned, who must have been made parties, if they had been amenable to its process, that these circumstances shall not expel other suitors, who have a constitutional and legal right to submit their case to a court of the United States, provided the decree may be made without affecting their interests. *Vattier v. Hinde*, 7 Pet. 252.

17. If defendants have distinct interests, so that substantial justice can be done by decreeing for or against one or more of them, over whom the court has jurisdiction, without affecting the interests of others, over whom it has not jurisdiction, its jurisdiction may be exercised as to the former. *Ibid.*

18. On a bill for the conveyance of real estate, a decree for the complainants was reversed on appeal because A., through whom some of the defendants claimed, was not made a party. A. was afterwards made a defendant by an amended bill when he answered, disclaiming all interest in the suit, and the bill was by consent dismissed as to him. The court had not jurisdiction of A., he not being a citizen of the same State, with the other defendants. *Held*,—that the right of the court to exercise jurisdiction over the other defendants was not affected by the dismissal as to him, over whom it had no jurisdiction, as his rights could not be affected by a decree for or against the others. *Ibid.*

19. Pending a bill against a trustee in a deed of trust of real estate to secure debts he died, and administration being granted to A., he was, on petition of the creditors interested

in the trust, made the substituted trustee, and a decree was rendered against him, as such, on the bill directing him to make certain conveyances. *Held*,—that the decree was invalid, and that the decree should have been against A. as administrator, or that a supplemental bill, in the nature of a bill of revivor, should have been filed against A. as substituted trustee, in which all the proceedings should be stated, and he be required to answer the allegations in the original and supplemental bill. *Greenleaf v. Queen*, 1 Pet. 138.

20. Where a party asking the aid of a court of equity refuses to comply with the conditions upon which that aid must depend, the court may refuse its aid, and dismiss the bill; but it would be harsh to make the decree of dismissal a bar to a future action. *Conn v. Penn*, 5 Wheat. 414.

21. Where an appellee had died after the commencement of the term, and the court, not knowing of his decease, heard the case, and decided thereon, they directed the decree to be entered as of the first day of the term. *Bank of United States v. Weisiger*, 2 Pet. 481.

22. A decree for a sale, made with the approbation of counsel filed in court, removes all preceding technical objections. *Kennedy et als. v. Georgia State Bank*, 7 How. 586.

DEMURRERS.

1. If any part of a bill is good, and entitles the complainant to either relief or discovery, a demurrer to the whole bill cannot be sustained. *Livingston v. Story*, 9 Pet. 632.

2. Where fraud is alleged in a bill and relief is prayed against a judgment and a judicial sale of property, a demurrer to the bill that relief can be had at law is not sustainable. *Shelton v. Tiffin*, 6 How. 163.

3. Where a bill in Chancery stated that at an execution sale which was alleged to have been open to competition, regular and fair, the complainant purchased for \$600 certain promissory notes, secured by mortgage, amounting in the whole to \$260,000. The bill was demurred to in the Circuit Court, and the Circuit Court sustained the demurrer. The United States Supreme Court reversed the judgment of Circuit Court on the demurrer, (mere inadequacy of price not of itself furnishing a sufficient reason for dismissing the bill or deciding that the complainant was entitled to no relief whatever. *Erwin v. Parham*, 12 How. 197.

DEPOSITIONS.

1. Where by the written consent of counsel, depositions taken in another cause were read in evidence at the hearing without objection, and the decree thereon was afterwards reversed on appeal, and the cause remanded for further proceedings, and on the second hearing the defendant objected to such depositions as evidence, on the ground that the reversal of the decree annulled the consent to their admission, it was held that such consent was co-extensive with the cause, and not limited to the first hearing, and that the depositions were admissible. *Vattier v. Hinde*, 7 Pet. 252.

2. The deposition of one defendant in chancery is not admissible against his co-defendant, unless he is made a disinterested witness by being discharged from all joint liabilities, and *semble*, that a certificate of discharge from all debts and contracts prior to the date of the discharge under the act of Assembly of Rhode Island, of 1757, although the debt in suit was contracted prior to such discharge, will not make one a disinterested witness where the debt was contracted in a foreign country. *Clark v. Riemsdyck*, 9 Cranch, 153.

3. Although no relief can be had against a certificated bankrupt or insolvent, who is a party defendant to a bill and he is not, therefore, a necessary party to the bill, yet he cannot be examined as a witness in the cause without an order on motion for that purpose. *De Wolf v. Johnson*, 10 Wheat, 367.

4. The cross-examination of a witness by the opposite party is considered a waiver of irregularity in taking the deposition. *Mechanics Bank v. Seton*, 1 Pet. 299.

5. A certificate of the person before whom the deposition was taken under the 30th section of judiciary act of 1789, that neither the adverse party nor his attorney lived within one hundred miles of such place, and that, therefore, no notice was made out, is sufficient. It is not necessary for him to state that they were not actually within one hundred miles.— If they had been temporarily within that distance and the certifying officer did not know it, the certificate would still have been good. *Dick et als. v. Runnels*, 5 How. 8. See *Harris v. Wall*, 7 How. 693.

6. If either of the two facts, viz: that the party resided within 100 miles, or that he was temporarily within that dis-

tance, and that the magistrate knew it, was established by parol proof, the certificate would then be irregular and void. *Ibid.*

DISCOVERY.

1. After answer and discovery, the rule is, that a suit brought merely for discovery, cannot be revived. *Horsbury v. Baker*, 1 Pet. 232.

2. Where the only ground of equitable jurisdiction is the discovery of facts solely within the knowledge of the defendant, and the defendant, by his answer, discloses no such facts, and the plaintiff supports his claim by evidence in his own possession, unaided by the confessions of the defendant, the plaintiff should be dismissed from the Court of Chancery, and assert his rights in a court of law. *Russell v. Clark*, 7 Cranch, 69.

3. A party is not bound to make any discovery which would expose him to penalties. *United States v. Saline Bank*, 1 Pet. 100. *Northrop v. Hatch*, 6 Conn. 361. *Skinner v. Judson*, 8 Conn. 528.

4. Parties claiming under a deed not executed and recorded, so as to be valid against subsequent purchasers without notice, may go into equity for a discovery, and if notice is brought home to the subsequent purchasers, the complainants will be entitled to a decree quieting their title. *Findlay v. Hinde*, 1 Pet. 241.

5. An assignee of an assignee of a co-partner in a joint purchase and sale of lands, can maintain a bill of discovery against the other co-partners, and the agent of the partnership, to ascertain the quantity purchased and sold, and for an account and distribution. *Pendleton v. Wambasie*, 4 Cranch, 73.

EVIDENCE.

See title "Depositions."

1. A copy of a deed from a clerk of the court, without the certificate of the presiding Judge, that the attestation of the clerk is in due form, cannot be received as evidence in a suit in equity. *Drummond v. Magruder*, 9 Cranch, 122.

2. A plat referred to in the deed as being annexed to it, but which was never in fact annexed, and was not recorded with

the deed, affords no evidence in aid of the description of the property mentioned in the deed. *Shinas v. Craig*, 7 Cranch, 34.

3. Entries in registers of burials, and in a family Bible, of the time of the death of a member of the family, are evidence to show the time of a person's decease. *Lewis v. Marshall*, 5 Pet. 469.

4. If the answer neither admits nor denies the allegations of the bill, they must be proved upon the final hearing.—*Young v. Grundy*, 6 Cranch, 51.

5. A complainant in equity may have relief even against the admissions in his bill. *Finley v. Lynn*, 7 Cranch, 238. *Sed quære*.

6. The answer of a defendant, where it is responsive to the bill, is evidence against the plaintiff. *Field v. Holland*, 6 Cranch, 8. *Russell v. Clark*, 7 Cranch, 69.

7. Where a cause is set down for hearing upon the bill, answer and exhibits, the whole of the answer must be considered as true. *Leeds v. Marine Ins. Co., of Alexandria*, 2 Wheat, 380.

8. If the answer of the defendant admits a fact alleged in the bill, but insists on matter of avoidance, the complainant need not prove the fact admitted, but the defendant must prove the matter in avoidance. *Clarke v. White*, 12 Pet. 178.

9. A policy of insurance contained a stipulation, that if the assured then had, or thereafter should have, any other insurance upon the same property, notice thereof should be given to the insurance company, and the same be indorsed upon the policy, or otherwise acknowledged by the company, in default of which the policy should cease. A loss of the property accruing, the assured filed a bill against the company, alleging notice of a subsequent insurance upon the same property to the defendant, and praying that the company might be compelled to endorse the notice upon the policy, or otherwise acknowledge it in writing. The answer of the company, sworn to by the then president, denied the notice to the best of his knowledge and belief. *Held*: that the answer being responsive to the bill, and denying the allegation under oath, the general rule applied and the allegation of the bill must be proved by two witnesses, or one witness, and other evidence. *Carpenter v. Providence Washington Ins. Co.*, 4 How., U. S. 185.

10. When facts alleged in the complainant's bill are denied in the answer, they must be proved by two credible witnesses, or one witness and strong corroborating circumstances. *Lee v. Montgomery*, Walker, 109. *Hughes v. Blake*, 6 Wheat. 453. *Union Bank v. Geary*, 5 Pet. 98.

11. An answer in chancery, although positive and directly responsive to the allegations in the bill, may be outweighed by circumstances, especially if the answer be respecting facts which in the nature of things, cannot be within the personal knowledge of the defendant. *Clark v. Van Riemdsdyck*, 9 Cranch, 153.

12. As a general rule, the answer of one defendant cannot be used as evidence against his co-defendant. *Leeds v. Marine Ins. Co. of Alexandria*, 2 Wheat, 380. *Osborn v. Bank of U. States*, 9 Wheat, 738.

13. The answer of one defendant is evidence against a co-defendant, who is his privy in estate, or who claims through him. *Morris v. Foote*, 2 Geo. Decis. 119. *Field v. Holland*, 6 Cranch, 8.

14. The answer of an agent is not evidence against his principal, nor are his admissions in pais, unless where they are a part of the *res gestæ*. *Leeds v. Marine Ins. Co. of Alexandria*, 2 Wheat, 380.

15. The plaintiffs cannot avail themselves of the answer of a defendant, who is substantially, though not in form, a plaintiff. It is not evidence against a co-defendant. *Field v. Holland*, 6 Cranch, 8.

16. The answer of one defendant in chancery, admitting the authority of the agent of both defendants to draw a bill of exchange, is not evidence against his co-defendant, unless such a partnership is established as would authorize the draft of the agent as one of the parties. *Clark v. Van Riemdsdyck*, 9 Cranch, 153.

17. Where one defendant succeeds to another, so that the right of the one devolves on the other, and they become privies in estate, the rule does not apply. *Osborn v. Bank of U. States*, 9 Wheat. 738.

18. The loss of a writing must be proved before parol evidence of its contents can be given. *Bouldin v. Massie*, 7 Wheat. 122.

19. But where a bill was filed by the heir of the warrantee

in a land warrant, to obtain a conveyance of the legal title from those who had obtained a patent as upon an assignment of the warrant, the assignment being no longer a necessary part of the title, the same degree of proof of its loss will not be required as if it were relied upon as a part of the title. *Ibid.*

20. In such case, where there is a strong degree of probability that the assignment has been lost or destroyed, its non-production ought not to operate against him claiming under it so as to defeat his title. *Ibid.*

21. Where it was testified that a subscribing witness to an instrument enlisted on board a privateer, and had not been heard of for four years, this was held sufficient to let in secondary evidence of his hand-writing. *Spring v. South Carolina Ins. Co.*, 6 Wheat. 268.

22. Where a receipt for the purchase money of land is more than 30 years old, and not only free from suspicion, but supported by other testimony, the subscribing witness thereto may be dispensed with in proving it. *Vattier v. Hinde*, 7 Pet. 252.

23. The subscribing witness to a bond being dead, proof of his hand-writing, if unaided and unopposed, is sufficient to establish the bond. *Murdock v. Hunter*, 1 Brock C. C. R. 135.

24. Though parol testimony is, in general, inadmissible, both at law and equity, to vary a written instrument, yet, in equity, parol evidence is admissible, to prove fraud, or mistake, or surprise in a written agreement. But the evidence must be strong and clear. *Hunt v. Rousmanier*, 8 Wheat. 174.

25. Where there is a doubt as to the existence of a trust, the burden of proof lies on the party who alleges it. *Prevost v. Gratz*, 6 Wheat. 481. *Gratz v. Prevost*, 6 Wheat. 481.

26. Where an account current is sent by a foreign merchant to a merchant in this country, between whom there are mutual dealings, and he keeps it two years without making any objections, it will be deemed an account stated, and his silence and acquiescence will so far bind him as to throw upon him the burden of proof. *Freeland v. Heron*, 7 Cranch, 147.

27. It is a rule, both at law and in equity, that the allegata and probata must correspond, and however just the demand proved by the complainant in equity, if his proof does not harmonize with the allegations in his bill, he cannot recover.

Clements v. Kellogg, 1 Ala. U. S., 330. *Piatt v. Vattier*, 9 Pet. 405. *Lindsay v. Etheridge*, 1 Dev. & Bat. Ch., 36.

28. It is a general rule, that a long acquiescence in letters containing accounts, is prima facie evidence of the correctness of their contents. *Hopkirk v. Page*, 2 Brock. C. C. R., p. 20.

INJUNCTION.

1. The proper condition of an injunction bond is, "to answer all damages which the defendant may sustain in consequence of the injunction being granted." *Bern v. Heath*, 12 How. 168.

ISSUE OUT OF CHANCERY.

1. When an issue is directed by a court of Chancery, to be tried by a court of law, and in the course of the trial at law questions are raised and bills of exception taken, these questions must be brought to the notice and decision of the court of chancery, which sends the issue; and if this is not done the objection cannot be taken in an appellate court of chancery.—*Brockett et als. v. Brockett et als.*, 3 How. 691. See also *McLaughlin v. Bank of Potomac*, 7 How. 220.

MASTERS IN CHANCERY. ¶

1. A complex and intricate account is an unfit subject for examination in court, and ought always to be referred to a commissioner, to be examined by him and reported, in order to a final decree; to such report the parties may take exceptions, and thus bring any question they may think proper before the court. *Dubourg de St. Colombe v. United States*, 7 Pet. 625.

2. On the reference of an account to a master for statement, he should admit the oath of a party to prove only such items as from their nature are not susceptible of full proof. *Harding v. Handy*, 11 Wheat. 103.

3. Where a matter is referred to a master for an account, he may examine the witnesses viva voce, the parties being present by their counsel and neither objecting. *Story v. Livingston*, 13 Pet. 359.

4. The report of a master is received as true, where no exception is taken; and the exceptions are to be regarded so far

only as they are supported by the special statements of the master, or by evidence which ought to be brought before the court by a reference to the particular testimony on which the exceptor relies. *Harding v. Handy*, 11 Wheat. 103.

5. Exceptions to a master's report must state article by article, those parts of the report which are intended to be excepted to; the exceptions to a report are in the nature of a special demurrer, and the party objecting must point out the error, otherwise the part not excepted to will be taken as admitted. *Story v. Livingston*, 13 Pet. 359.

6. If the chancery court below refers matters of account to a master, his report cannot be objected to in the appellate court, unless exceptions to it have been filed in the court, below in the manner pointed out by the 73rd rule of Supreme Court. *Brockett et als. v. Brockett et als.*, 3 How. 691.

MULTIFARIOUSNESS.

See title "Bills."

1. The objection of multifariousness can be taken by a party to the bill only by demurrer or plea or answer, and cannot be taken for the first time at the hearing of the cause; but the court itself may take the objection at any time. *Oliver v. Piatt*, 3 How. 333; and the objection can only be taken advantage of by demurrer or exception to the pleading and must be made *before answer*, and can be tested only by the structure of the bill itself. *Nelson v. Hill*, 5 How. 127, 132.

PARTIES.

1. All persons materially interested in the subject of the suit ought to be made parties, either as plaintiffs or defendants, in order to prevent a multiplicity of suits, and that there may be a complete and final decree between all parties interested; but this rule is subject to many exceptions, and is more or less within the discretion of the court, and ought to be restricted to parties whose interests are involved in the issue, and to be affected by the decree; and the relief granted will always be so modified as not to affect the interests of others. *Mechanics' Bank v. Seton*, 1 Pet. 299. *Story v. Livingston*, 13 Pet. 359.

2. Where a decree in relation to the subject matter of litigation can be made without a person having his interest in

any way concluded by the decree, he is not an essential party. *Story v. Livingston*, 13 Pet. 359.

3. One of the great principles upon which courts of equity generally require all parties, who are known and within reach of its jurisdiction, to be made parties, is to prevent future litigation, and take away multiplicity of suits. *Mandeville v. Riggs*, 2 Pet. 482.

4. No one need be made a party complainant in whom there exists no interest, and no one party defendant from whom nothing is demanded. *Kerr v. Watts*, 6 Wheat. 550.

5. On account of the limited and peculiar jurisdiction of the United States courts, if an equity cause may be proceeded in to a final decree between the parties to it, without making others parties, who would generally be considered necessary parties, they need not be made parties where the process of the court cannot reach them, or they be citizens of another State. *Mallow v. Hinde*, 12 Wheat. 193.

6. But if a final decree between the litigating parties will necessarily affect the rights of those who are absent, the peculiarity of the jurisdiction of the court will not authorize the dispensing with them. *Ibid.*

7. Though it seems that the court might, in case of an injunction bill, retain jurisdiction of the parties regularly before it, until the plaintiffs could have opportunity to contest the claims of the other parties in a competent tribunal; and, if it is then made to appear, by the judgment of such tribunal, that the complainants are entitled to the interest claimed by such other parties, the court may proceed to a final decree.—*Ibid.*

8. On a bill, by an executor against a devisee of land, charged with the payment of debts, for an account of the trust fund, the creditors are not indispensable parties to the suit. *Potter v. Gardner*, 12 Wheat. 498.

9. The Supreme Court of the United States will not make a final decree upon the merits of a case, unless all parties who are essentially interested are made parties to the suit, although some of those persons are not within the jurisdiction of the court. *Russell v. Clark*, 7 Cranch, 69.

10. The want of proper parties is not sufficient ground for dismissing a bill. *Milligan v. Milledge*, 3 Cranch, 220.

11. The want of proper parties is not a good plea, if the bill suggests that such parties are out of the jurisdiction of the court. *Ibid.*

12. A bill may be dismissed, where the plaintiff, when called upon to make proper parties, refuses or is guilty of unreasonable delay in doing so; but not without demurrer, plea, or answer, pointing out the person or persons which the defendant insists ought to be made parties. *Greenleaf v. Queen*, 1 Pet. 138.

13. Objection to the want of a party complainant, where it does not appear on the face of the bill, must be taken advantage of by plea and answer. The objection of misjoinder of complainants must be made by demurrer or on answer. It is too late to make such formal objection for the first time at the hearing. *Story v. Livingston*, 18 Pet. 359.

14. Where the objection, for want of proper parties, is not taken till the hearing on appeal; it ought not to prevail except in very strong cases, and where the court perceives that a necessary and indispensable party is wanting. *Mechanics' Bank v. Seton*, 1 Pet. 299.

15. In a bill against an unincorporated banking company, the members of which are numerous, and in part unknown, it is not necessary to bring all the stockholders before the court, before a decree can be made. *Mandeville v. Riggs*, 2 Pet. 482.

16. The United States, proceeding as an unpreferred creditor against the debtor of their debtor in a bill in equity for an account, &c. should make their original debtor a party to the bill, and have the account taken between him and his debtor. *United States v. Howland*, 4 Wheat. 108.

17. One endorser of a promissory note, against whom a bill in equity is brought, has a right to insist that the other endorsers be made parties. *Riddle v. Mandeville*, 5 Cranch, 322.

PLEAS.

1. A mere denial of facts is proper for an answer, but not for a plea. *Milligan v. Milledge*, 3 Cranch, 220.

2. A plea in bar to a bill in chancery denying only part of the material facts stated in the bill, is not good; a mere denial of facts is proper for an answer but not for a plea. *Milligan v. Milledge*, 3 Cranch, 220.

3. An account stated is a good plea in bar to a bill in equity, except where palpable errors in the account, and such as cannot be misunderstood, are shown by the complainant. *Chappedelaine v. Dechenaux*, 4 Cranch, 306.

4. On a bill by Rhode Island against Massachusetts, for the settlement of the boundary line between those States, the defendant State filed a plea setting forth agreements of compromise in respect to the line, entered into between the States in 1710 and 1718, and averring possession and sovereignty exercised by her over the territory in dispute ever afterwards, according to the terms of the agreements. *Held*,—that the plea was bad for multifariousness, in that it relied upon the agreement as a compromise of the dispute, and, as a distinct matter of defence, the exercise of possession and sovereignty over the disputed territory as giving them a right by prescription. *Rhode Island v. Massachusetts*, 14 Pet. 210.

REPLICATION.

1. The replication puts the matter of the plea in issue, and it is incumbent on the defendants to support it. *Stead v. Course*, 4 Cranch, 403.

2. A bill set out a title to land in A., the wife of B., by direct descent from her brother, and claimed under this title; the answer alleged a conveyance of this title, before the institution of the suit to C.; the replication admitted the conveyance to C., but alleged that it was in trust to convey the same to B., to hold the same for the benefit of A. and her children, which trust C. had executed. The deed of C. was recorded, but did not disclose the alleged trusts. *Held*,—that this was a departure from the statements which the rules of chancery would not admit, and that the plaintiffs should have applied for leave to amend their bill. *Vattier v. Hinde*, 7 Pet. 252.

3. A replication to a plea is always an admission of the sufficiency of the plea itself, as much so as if it had been set down for argument and allowed; and if the facts relied on by the plea are proved, a dismissal of the bill on the hearing is a matter of course. *Hughes v. Blake*, 6 Wheat. 453. See also *Poultney v. City of Lafayette*, 3 How. 81.

SUPPLEMENTAL BILL.

1. Where relief is sought on the ground of an agreement between the parties *pendente lite*, it must be presented by supplemental bill. *Hobson v. McArthur*, 16 Pet. 195.

2. A supplemental bill is filed on leave and for matter happening after the filing of the bill and is designed to supply some defect in the structure of the original bill. *Kennedy v. Georgia State Bank*, 8 How. 586.

IV.

Forms of original bills, informations, cross bills, bills of interpleader, &c.

[In the following forms, the small figures, thus: (1), (2), &c., are intended to mark the several parts of the bill, agreeably to the division mentioned in preceding volume, section 25. (1) denotes the address; (2) the names of plaintiffs; (3) the stating part; (4) the charge of confederacy, &c. In several forms, many of these parts do not occur; in these cases, the omission may be readily seen by the failure to insert the figures.]

GENERAL FORMULA OF BILLS.

COMMENCEMENT OF BILLS (a), EMBRACING (1) "ADDRESS" AND (2) "NAMES OF PLAINTIFFS."

In the United States Circuit Courts.

(1) "To the Judges of the Circuit Court of the United States for the District of —": (2) A. B. (b) of —, and a citizen of the State of —, brings this his bill against C. D. of —, and a citizen of the State of —, and E. F. of —, and a citizen of the State of —; and thereupon your orator complains and says that," &c.

(a) See Book I. chap. II, sections 27-32.

(b) If by a married woman, or infant, suing by a next friend, then add: "a *feme covert*, who sues by J. L. her next friend," or "an infant under the age of twenty-one years, who sues by J. L. his next friend." If committee of a lunatic or convict sue, add—"a committee duly appointed of the person and estate of E. F. a lunatic," or "committee of the estate of E. F. a convict."

In case of Creditor's bill, see note 27 to p. 15, *ante*.

In Virginia State Courts.

To a Circuit Court—as follows :

(1) To the honorable J. B. C. Judge of the Circuit Court of the County of ——— : (*) Humbly complaining, sheweth unto your honor your orator, A. B. (c) ———, of ———, a merchant (d), that, &c.

To a County or Corporation Court—as follows :

(1) "To the worshipful Justices of the Hustings Court of the City of ———," (or, "To the worshipful Justices of the County Court of ——— County") : (*) Humbly complaining, sheweth unto your worships your orator, &c. (as before.)

(3) STATEMENT IN BILLS.

See sections 34-41, in preceding volume.

[No formula of statement in bills can be made. The form of statement in each case must depend upon the facts, and every material averment necessary to support plaintiff's right to relief asked, should be made. See subsequent forms of bills, in which statements in particular cases are given ; also, forms of statements in special cases, *post.*]

(4) CHARGE OF CONFEDERACY.

See sections 42-3, in preceding volume.

(5) CHARGING PART.

See sections 44-46, in preceding volume.*

(e) See note (b) above.

(d) Better state occupation and residence—though this practice is quite rare in Virginia. It may be questioned whether, if these be omitted, a demurrer or a plea in abatement would not hold.

[* A late English author, Mr. Whitworth, who has written a work on Equity Precedents, gives the following among other forms under this head, which, if deemed proper, may be used :

"Your orator charges that the said [] had been and was for some time previous to and up to and at the date of the execution of the said Indenture addicted to the habit of drinking, and in consequence thereof was liable to be imposed upon, and that the said defendant took advantage of such weakness and infirmity of the said [] to obtain from him the execution of the said indenture.

"The said defendant pretends that the said lease is valid at law, and that he ought to have the benefit thereof ; whereas your orator charges the contrary, and that at the time of the execution of the said lease by

(6) AVERMENT OF JURISDICTION.

See sections 47-50, in preceding volume.

the said [], he was of such weak intellect, as to be unable to understand the effect of the said lease, or to manage his own affairs; and that by reason thereof the said lease ought to be declared void, and be delivered up to your orator.

"Your orator charges that the said defendants have defrauded your orator in respect of the matters aforesaid, and that the said defendants' said security ought to be declared void as against your orator; for your orator charges that the said defendants represented to your orator that the said hereditaments, at the time when the said [] applied to your orator for the aforesaid loan, were free and unincumbered, and on the faith of such representation your orator granted to the said [] the said loan on the security of the said hereditaments, but the same hereditaments were in fact at the time such representations were made subject to the said defendants' security, although the same was not known to your orator.

"Your orator charges that the said defendant admitted your orator's claim to be valid as against him, and that there was then due to your orator from him in respect thereof in a letter bearing date, &c., and sent by him to and received by your orator.

"Your orator charges that your orator is entitled to the said lands and premises as aforesaid; which the said defendant will sometimes admit; but then he pretends that your orator is barred by a decree made in relation to the same matters by this honorable Court; whereas your orator charges the contrary, and that if any such decree was ever made, the same was obtained by fraud, and in particular that the same was made without due notice to your orator, and that the same questions were not thereby raised as are raised in this suit.

"The said defendant pretends that there is not anything due to your orator in respect of the matters aforesaid; whereas your orator charges the contrary to be true; and at other times the said defendant pretends that if anything is due to your orator that the said defendant has been released by your orator therefrom, and from every claim in respect thereof; whereas your orator charges the contrary to be true, and that if any such release was executed by your orator, such release ought not to be binding on your orator in equity, inasmuch as the said defendant was and is a trustee for your orator in respect of the matters aforesaid, and no just account thereof has ever been rendered by him to your orator, including the account of the dividends of the said sum of £—— so received by the said defendant as aforesaid, nor has the said defendant ever paid to your orator any part of such last-mentioned dividends.

"Your orator charges that, although the said [] claims to be interested in the matters aforesaid, as one of the legatees under the said will, yet he declines to join your orator as co-plaintiff in this suit.

"Your orator charges that the said [] is now resident at [], out of the jurisdiction of this honorable Court.

"But then the said defendant pretends that he is not accountable in Equity, in respect of the matters aforesaid; whereas your orators charge the contrary, and the more especially as your orators charge that they have no means of having, except by a discovery from the said defendant,

(7) INTERROGATING PART.

See sections 51-55, in preceding volume.

In United States Circuit Courts—as follows :

(7) To the end, therefore, &c. (as in preceding volume, section 53.) (e)

In Virginia State Courts—as follows :

(7) To the end, therefore, that justice may be done, your orator prays that the said C. D. and E. F. be made parties defendant to this bill, and required on their several and respective corporate oaths, according to the best and utmost of their several and respective knowledge, remembrance, information and belief, a full, true, direct and perfect answer to make to all and singular the matters aforesaid, and that as fully as if the same were here repeated and they particularly interrogated thereto; (if desirable to probe the consciences of defendants yet farther, add : “and more especially that the said defendants may in manner aforesaid, answer and set forth, whether,” &c., putting such questions as may be deemed advisable.)

[Forms of interrogatories may be seen in forms of bills hereafter given. See also forms of interrogatories in special cases, *post*.]

(8) PRAYER FOR RELIEF.

See sections 56-58, of preceding volume.

In United States Circuit Courts—pray for special relief desired—then add prayer for general relief, as found in section 57 of preceding volume.

In Virginia State Courts—prayer for special relief may be omitted, but it is generally better to insert it. Add prayer for general relief, as above.

[Forms of prayer for relief may be seen in the forms of bills hereafter given. See also forms of prayer for special relief, *post*.]

the particulars of the sales effected by the said defendant [*the auctioneer*,] or which of them remain unsold, or what sums of money have been received by him from the sales thereof: all which particulars your orators charge the said defendant ought to set forth.”

(e) Since the adoption of XCIII. Rule of the Supreme Court U. S., this form of interrogatory in the United States Circuit Courts seems unnecessary; but it is better to use this form whenever practicable.

(8) PRAYER FOR PROCESS.

See sections 59-60, of preceding volume.

In United States Circuit Courts—as follows :

"May it please the honorable court to grant a writ of subpoena, directed to the Marshal of the District of ———, and commanding the said ——— to appear and make answer unto this bill of complaint, and to perform and abide by such orders and decrees herein as to the Court may seem required by the principles of equity and good conscience."

In Virginia State Courts—as follows :

"That proper process may be directed against the several defendants herein before named"; or "that proper process may be directed against the several defendants herein before named, [and that your orator may have all such farther and other and general relief as the nature of his case may require, or to equity may seem meet.]"

The foregoing are forms of the nine parts of the bill as laid down in the books. The following may be added :

(10) CONCLUSION.

See sections 61, 62, in preceding volume.

In United States Circuit Courts—"And your orator will ever pray," &c. A. A. M., p. q.

"The defendant C. D. is required to answer the interrogatories numbered respectively 1, 3 and 5; the defendant E. F. to answer those numbered respectively 1, 2, 4 and 6." (f)

In Virginia State Courts—"And your orator will ever pray, &c. A. A. M., p. q."

(11) AFFIDAVITS.

See section 62, in preceding volume.

Affidavits are necessary in bills requiring the restraining order of the Court, as in the case of injunction; also to bills of discovery in certain cases, bills of interpleader, &c.(g)

(f) Since the adoption of XCIII. Rule by Supreme Court U. S., this form seems unnecessary. It is better, however, to use it whenever practicable.

(g) In the State of New York, all bills are required to be sworn to, except in cases in which plaintiff expressly waives his right to an answer on oath from the defendant.

The following are forms of affidavits annexed to bills in such cases :

To a bill for injunction, writ of ne exeat, and the like : Corporation (or, County) of _____. This day personally appeared before me, a notary public, (or justice of the peace, or commissioner of the court,) or [any other person authorized to administer such oath,] in the County aforesaid, A. B., plaintiff in annexed bill, and made oath that the statements made in the said bill, so far as made of his own knowledge, are true, and so far as made upon knowledge or information derived from others, he believes them to be true. Given under my hand, this _____ day of _____.

To a bill of interpleader : (See section 425, of preceding volume.) Corporation (or, County) of, (&c., as before)—made oath that the statements in the foregoing bill, so far as made of his own knowledge, are true, and so far as made upon knowledge or information derived from others, he believes them to be true; and further made oath that there is no collusion between him and any one or more of the defendants in said bill or any other party thereto. Given under my hand, this _____ day of _____.

To a bill to perpetuate testimony : (See section 432 of preceding volume.) Corporation (or, County) of, (&c., as before)—“made oath that the statements made in the foregoing bill, so far as made of his own knowledge, are true, and so far as made upon knowledge or information derived from others, he believes them to be true. Given under my hand, this _____ day of _____.”

[If the circumstances by which the evidence intended to be perpetuated is in danger of being lost are *not* stated in the bill, it will be necessary in the affidavit to set forth particularly such circumstances.]

To a bill of discovery : [When a bill seeks discovery of deeds or writings, by the English practice the plaintiff is required to annex an affidavit to the bill that they are not in his custody or power, and that he knows not where they are, unless they are in the hands of the defendant; and it is supposed this is the proper practice in the United States Circuit Courts and in the Virginia State Courts. If stating part of bill contain allegations to the effect “that such deeds or writings are not in plaintiff’s custody or power, and that he knows not where they are, unless they are in the hands of the defendant,” an ordinary affidavit like that to a bill for injunc-

tion *supra*, is thought to be sufficient. If such statement be not made in the bill, then the affidavit should be as follows: "Corporation (or County) of," [&c., as before]—"made oath that the statements in the foregoing bill, so far as made upon his own knowledge, are true, and that the said statements, so far as made upon knowledge or information derived from others, he believes them to be true; and further made oath that (here describe deeds or writings) are material to the protection of his rights, and that the same are not in his custody or power, and that the said plaintiff knows not where the said deeds (or, writings) are, unless they are in the hands of the defendant. Given under my hand, this — day of —."]

To a cross bill: [A cross bill should be sworn to, when the plaintiff desires an order to stay proceedings in original suit. See form of affidavit to a bill for injunction, and follow that form.]

To a bill of review: [See section 463—472 of preceding volume.] The following is the form of affidavit: "Corporation (or, County) of," [&c., as before]—"made oath that the statements made in the foregoing bill, so far as made upon his own knowledge, are true, and so far as made upon knowledge or information derived from others, he believes them to be true; and further made oath, that the evidence mentioned in the said bill, to-wit: (here describe it,) was discovered by him since the rendition of the decree complained of in the said bill, and that the said evidence was not and could not have been used at the time said decree was rendered, because he, the said —, was at that time ignorant of the fact that such evidence was in existence and could be procured. Given under my hand, this — day of —."

GENERAL FORMULA OF INFORMATION.

Commencement—including address and names of parties.

(¹) To, &c. (as in address to bill,) (²) Informing, sheweth to the Court J. R., Attorney General of the State of Virginia, that, &c. (a) (The remainder of the information is framed like a bill.)

(a) It will be observed that this formula is applicable to the Virginia State Courts. Upon a minute examination of the records of United States Circuit Court held in this city, no case has been found in which the United States begin their proceedings by information. They uni-

GENERAL FORMULA OF INFORMATION AND BILL COMBINED:

Commencement—including address and names of parties.

(¹) To, &c., (as in address to bill.) (²) Informing, sheweth to the Court J. R., Attorney General of the State of Virginia, and your orator A. B. humbly complains and says that, &c. (following form of bill to conclusion) (*b*).

FORMS OF BILLS IN SPECIAL CASES.

Bill in United States Circuit Courts for the foreclosure of a mortgage.(*c*)

(¹) To the Judges of Circuit Court of the United States, for the ——— District of ———:

(²) A. B. of ———, and a citizen of the State of ———, brings this his bill against C. D. of ———, and a citizen of the State of ———, and thereupon your orator complains and says—(³) that the said C. D. being seised to him and his heirs in fee simple, or otherwise well entitled to certain land lying in ——— county, in this State, applied to your orator to advance and lend him the sum of \$——, upon the security of the said land; and your orator thereupon agreed to do so, and did accordingly lend the said C. D. the said sum of money, and the said C. D. in accordance with his agreement, executed a deed of mortgage conveying the said land as therein recited—which deed is herewith filed as an exhibit with this bill, marked X, and prayed to be taken as part thereof; that at the time limited and appointed by the said deed of mortgage for the re-payment of the said sum of money, with interest thereon, to-wit: on the ——— day of ———, the said C. D. failed to pay the same or any part thereof to your orator, and that the said sum, as well as all interest accruing thereon, is yet due and unpaid; and your orator is advised that by the failure on the part of the said C. D. to make such payment, the said land, with all its privileges and appurtenances of every kind, became vested in your

formly institute a suit in equity by bill. This also seems to be the practice in the United States Courts in other circuits. No sufficient reason for this course has occurred to the writer.

(*b*) See note (*a*) to preceding form; also section 64 in preceding volume, and note to that section. (*c*) See section 40 of this work.

orator. ⁽⁶⁾ (a) In tender consideration whereof, and forasmuch as your orator is remediless in the premises by the strict rules of common law, and cannot have adequate relief except in a court of equity, where matters of this kind are properly cognizable and relievable. (b) ⁽⁷⁾ To the end, therefore, that the said defendant (c) may, if he can, shew why your orator should not have the relief hereby prayed, and may, upon his corporate oath, and according to the best and utmost of his knowledge, remembrance, information and belief, full, true, direct and perfect answer make to such of the several interrogatories herein after numbered and set forth, as by the note here under written, he is required to answer—that is to say:

1. Whether, &c. (here insert interrogatory.)

2. Whether, &c.

3. Whether, &c. (d)

⁽⁵⁾ *And that it may be referred to one of the masters of this honorable court, to take an account of what is due your orator for principal and interest on his said mortgage security from the said defendant, (e) and that the said defendant may be decreed to pay to your orator what shall be found due on such account, by a short day, to be appointed by this honorable court in that behalf, together with your orator's costs; and in default, that the said C. D. and all persons claiming under him, may be forever barred and foreclosed of and from all right of redemption of, in, and to the said mortgaged premises, or any part thereof; and may deliver up to your orator all deeds, papers or writings, in his custody or power, relating to or concerning the said mortgaged premises. (f)* And that your orator may have all such farther and other and general relief in the premises as the nature of his case may require, or to equity shall seem meet.

(a) ⁽⁴⁾ The charge of confederacy, and ⁽⁵⁾ the charging part, are omitted. See sec. 43 and 46, *ante*. (b) See sec. 47, 48 and 49, *ante*. (c) Where there are ~~more than one~~ ^{one} defendant, see sec. 53, *ante*, for form of this clause.

(d) See, however, XCIII. Rule of Supreme Court U. S. This clause, in this form, does not seem necessary, but it is better to insert it whenever practicable.

(e) The words in italics are, of course, unnecessary when the amount may be ascertained by a simple calculation by the Court, or at the bar—though they will not prejudice the plaintiff in any case.

^(f) (f) The words in italics will do no harm, and there are cases in which they are eminently proper.

(*) May it please the honorable court to grant a writ of subpoena, directed to the Marshal of the District of ———, and commanding the said C. D. to appear and make answer unto this bill of complaint, and to perform and abide by such orders and decrees herein as to the Court may seem required by the principles of equity and good conscience.

And your orator will ever pray, &c.

J. M. P., p. q.

Memo. The defendant C. D. is required to answer all the interrogatories numbered consecutively, 1, 2, 3, &c.

Bill of foreclosure in Virginia State Courts.

(1) To the Honorable J. B. C., Judge of the Circuit Court for the County of ——— :*

(2) Humbly complaining, sheweth unto your honor, your orator, A. B.,† (3) that C. D. being seised to him and his heirs in fee simple, or otherwise well entitled to, &c. (*following next preceding form down to (7)*)—then proceed :) (7) To the end, therefore, that justice may be done in the premises, your orator prays that the said C. D. may be made a defendant to this bill, and required on his corporate oath and according to the best and utmost of his knowledge, information and belief, to make full, true, direct and perfect answer to the statements of this bill, as fully and completely as if the same were here repeated and he thereto specially interrogated; (8) that the said defendant may be decreed to pay your orator the said sum of money, with interest thereon,‡ by a short day to be appointed by this honorable court, and that in default of such payment, the said C. D. and all persons claiming under him, may be forever barred and foreclosed of and from all right of redemption of, in, and to the said mortgaged premises, or any part thereof; that proper process may be directed against the said defendant,§ and that your orator may have all such far-

* This is the form of address in Circuit Courts. See sec. 29, *ante*, for form when suit is instituted in County Court; and notice that the County Courts are all addressed by the title of "worshipful justices" or "worshippes." These terms should, therefore, be used wherever the words "your honor" are found in this form.

† It is better, always, to insert the residence and occupation of the plaintiff.

‡ If account be complicated, it would be proper to pray specially for an account, as in next preceding form, using the word "commissioners," instead of "masters."

§ The reader will observe that the prayer for process is much abbreviated in this form, and interpolated in the prayer for relief. See sec. 60, *ante*.

ther and other and general relief in the premises as the nature of his case may require, or to equity shall seem meet. And your orator will ever pray, &c.

W. G., p. q.

Bill for specific performance of agreement by vendor against vendee.

(¹) To, &c. (See several forms of *address* in general formula.)

(²) Humbly complaining, sheweth unto the Court your orator, R. O. (³) That your orator now is, and for some time before the year — was seised of, or entitled to, a good fee simple estate in and to certain land lying in the county of —; and your orator being so seised or entitled, and being desirous to sell the same, did contract with one J. F., some time in the year —, for the sale of the said land to him; at which time the said J. F. did agree to purchase the said land of your orator, at the price of —, and an agreement in writing was entered up between your orator and the said J. F., and was duly signed by your orator and the said J. F.—which agreement is herewith filed, marked A. and prayed to be taken as part of this bill. That by this agreement, as will appear on reference thereto, the said J. F. contracted to pay your orator the cash instalment of the said purchase money, (the same having been split up in three payments: one cash, the second in six months, and the third in twelve months from the time of sale,) so soon as a proper deed was executed by your orator, conveying the said land to the said J. F., if your orator could then assure him of a good title in the said land: And your orator further sheweth, that in performance of the said agreement, he did, on the — day of —, execute a good and sufficient deed of conveyance, conveying the said land to the said J. F., and tendered the same to him the said J. F., and that at that time, as now, your orator was possessed of a good fee simple title to the land thereby intended to be conveyed: That the said J. F. refused then to comply with the said contract on his part, by refusing to pay your orator the cash instalment as aforesaid, and executing negotiable notes for the remainder, payable at the times specified in said agreement; and that the said J. F. still refuses to comply with the said contract, though he has been several times applied to by your orator and his agent to comply with the same. All which actings and doings are contrary to equity and good conscience. (⁶) In tender considera-

tion whereof, and forasmuch as your orator is remediless in the premises, save by the aid of a court of equity, where matters of this kind are alone and properly cognizable, your orator prays (?) that the said J. F. may be made a party defendant to this bill, and required to answer the same on oath, as fully and particularly as if the allegations herein were here again repeated, and he thereto specially interrogated, (*) that the said agreement, entered into between your orator and the said J. F. may be specifically performed and carried into execution by the said J. F.—your orator hereby offering to perform the same on his part; and that the said J. F. may be compelled to pay your orator the amount of purchase money of said land, with interest on the several instalments thereon from the several periods when the said purchase money would have been payable, had the said J. F. not failed to comply with his contract, your orator offering herein to convey by a good and sufficient deed of conveyance the said land to the said J. F.; [that proper process may issue,] and that your orator may have such other further and general relief as the nature of his case may require, or to equity shall seem meet. And your orator will ever pray, &c.

J. A. M.; p. q.

[Note.—Foregoing form, drawn for Virginia State Circuit Courts, may be readily adapted to a bill in the United States Circuit Courts, or in other Courts of Virginia.]

Bill by simple contract creditors, against administrators, and in case personal estate insufficient, to have assets marshalled.

(1) *To, &c. (as in general formula.)*

(2) Humbly complaining, shew unto the court, your orators, A. B. of, &c., and C. D. of, &c., on behalf of themselves, and all others the simple contract creditors of E. F., late of, &c., deceased, who shall come in and contribute to the expense of this suit, (*) that the said E. F. departed this life on or about, &c., and was in his life-time, and, at the time of his death, justly and truly indebted unto plaintiff A. B. in the principal sum of \$——, with an arrear of interest thereon, upon and by virtue of his the said E. F.'s promissory note of hand in writing, bearing date, &c., for the securing the payment of the said sum of \$——, to said plaintiff, with interest for the same, at and after the rate of 6 per cent. per annum, as by said promissory note, &c. will appear.

That the said E. F. in his life-time, and at the time of his death, was also justly and truly indebted unto plaintiff C. D. in the sum of \$—— and upwards, for goods sold and delivered, and moneys paid, laid out and expended, to and for his the said E. F.'s use.

That the said E. F. was in his life-time, and at the time of his death, possessed of a very considerable personal estate more than to have satisfied, and paid all his just debts and funeral expenses; and also was entitled and seised of considerable real estate and particularly of divers lands in the county of ——.

That the said E. F. being so seised and possessed, departed this life at or about, &c., intestate, and without issue, leaving a widow S. F., and a brother R. F., who are entitled to such of his estate as may remain after the payment of all debts, expenses of administration, &c.; that due administration of the estate of the said E. F. was duly granted by the —— court of —— to the said S. F.

That under and by virtue of her administration, she the said S. F. hath become possessed of the whole or the greater part of the said intestate's personal estate and effects, and that his real estate has ever since been in possession of the said S. F. and R. F., and the rents and profits thereof have been received by them for their own use.

That —— dollars have been paid unto your orator, A. B., in part discharge of his said debt, but that the remainder thereof together with arrears of interest on the whole is yet justly due and owing unto him; and that the whole of your orator's, C. D.'s debt is yet due.

That the said S. F. having possessed the said E. F.'s personal estate and effects as aforesaid, has been applied to by your orators to pay and satisfy them, their said demand by and out of such personal estate and effects as had come to her hands, and that she the said S. F. and the said R. F. were also applied unto by your orators, and your orators requested them if the said intestate's personal estate and effects were not sufficient by reason of application thereof, or any part thereof to the payment of any specialty creditors of the said intestate to satisfy other creditors not of that class, that they the said S. F. and R. F. would consent that the deficiency thereof might be raised by sale of a competent part of the said intestate's real estate, or that the said intestate's real and personal assets might be marshalled, and his personal estate and effects applied in payment of his simple contract debts

and his speciality debts paid out of his real estate. [* And plaintiff well hoped, &c. (4) But now, &c.] All which actings and doings on the part of the said S. F. and R. F. are contrary to equity and good conscience, and tend to the manifest wrong and injury of your orators in the premises. (5) In tender consideration whereof, and forasmuch as your orators are remediless in the premises, save by the aid of a court of equity, where matters of this nature are properly cognizable and relievable. (7) To the end therefore that justice may be done in the premises, your orator prays that the said S. F. in her own right, and as administratrix of the estate of the said E. F. dec'd, and that the said E. F. may be made parties defendants to this bill, and required on their several and respective corporate oaths to answer the same (as in general formula.)

(8) That an account may be taken, by and under the decree of this honorable court, of the said debt so due to your orators as aforesaid, and of all other debts which were owing by the said testator at the time of his death, and which still remain unpaid. And that an account may also be taken of the said testator's personal estate and effects received by or for the use of the said S. F. as such administratrix as aforesaid; and that the personal estate and effects of the said E. F. may be applied in payment of his said debts in a due course of administration: And that so much thereof as shall remain, after payment of the said E. F.'s debts by specialty, may be applied in or towards the payment of the said debt so due to your orators as aforesaid, and the debts of all other unsatisfied creditors of the said E. F., by simple contract, who shall come in and contribute to the expense of this suit, in proportion to their respective demands; and in case it shall appear, that the whole, or any part of the said E. F.'s personal estate has been exhausted, or applied in or towards the payment of his specialty debts, and that the residue thereof is not sufficient to answer the debts of your orators, and the said E. F.'s other debts on simple contract; then that it may be declared that your orators and the other creditors by simple contract of the said testator, ought to stand in the place of the said testator's creditors by specialty, who have had, or shall have

* See General formula preceding. It will be observed that in above form a part of the charging part is preserved. Pretences and charges may here be inserted, forms of which may be found in note to general formula, page 313.

a satisfaction for their debts out of the said personal estate, and may have satisfaction out of the said real estate for so much of their respective debts as his personal estate shall be deficient to answer, by reason of the same having been exhausted or applied in or towards the payment of his debts by specialty; and that the same may be decreed accordingly; and that the said real estates may be sold or mortgaged for that purpose; and that all proper parties may be decreed to join in such sale or mortgage, and that the money to arise from such sale or mortgage may be paid to your orators, and the said other creditors by simple contract accordingly. And that your orators and the said other unsatisfied creditors by simple contract of the said E. F. may have such further and other relief in the premises as to the court may seem meet, and the circumstances of this case require. ⁽²⁾ May it please the court (as in general formula to the end.)

G. M., p. q.*

Bill by a landlord against lessee for years, who had ploughed up lands contrary to the terms of his lease, and had suffered the farm to continue out of repair, with prayers for special relief and for injunction.

(1) *To, &c.* (as in general formula.)

⁽²⁾ Humbly complaining, sheweth unto the court, your orator, A. B., ———, of ———; ⁽³⁾ that your orator being seised in fee simple of or otherwise well entitled unto certain land and premises lying and being, &c., (here describe the land and premises,) by an agreement in writing, bearing date on the ——— day of ———, and made between your orator of the one part, and C. D. of the other part, did demise, lease and to farm let the said land and premises unto the said C. D., from the ——— day of ———, for the term of ——— years, thence next ensuing, at the yearly rent of \$—— payable quarterly, as in said agreement of writing mentioned, and under and subject to the covenants, stipulations and agreements therein contained, on the part of the said C. D., his executors, administrators and assigns, to be observed and per-

* This form is now of little utility in Virginia. In those States of the Union which have not by express statutes placed specialty and simple contract creditors on the same footing, this bill will be of service.

If suit be instituted in United States Courts, refer to general formula and adapt this form to these courts.

formed; in which said agreement, there is a covenant on the part of the said C. D., that he the said C. D., his executors, administrators and assigns, should and would, &c., [stating briefly the covenant to keep premises in repair, and to cultivate land properly, &c.,] as by the said agreement will appear, which agreement in writing is herewith filed, marked A., and prayed to be taken as a part of this bill. And your orator further sheweth, that the said C. D. took possession of all the said demised premises, and that the same were then in good repair and condition, but have since become very ruinous and bad, and the said lands become very much deteriorated from the wilful mismanagement and improper cultivation thereof by or on the part of the said C. D., and that he has ploughed up certain fields called — containing — acres, contrary to the terms of his said lease or agreement in writing, and has otherwise committed great spoil, waste and destruction. And your orator further sheweth, that he hath frequently by himself and his agents applied to the said C. D., and requested him to put the said land and premises, and all the buildings, fences, gates and stiles thereon into good repair, and to keep the same in good and sufficient repair during the remainder of the said term, and to make satisfaction to your orator for all the damage done to the said estate by his mismanagement or neglect in the management thereof, according to the terms of the said agreement in writing, and course of husbandry practised in the neighbouring country; and your orator hath also, in like manner, requested him not to plough up any other of the said lands demised to him as aforesaid, which he is not at liberty to plough according to the terms of the said lease. [*And your orator well hoped, &c. (*) But

* See general formula preceding. Pretences and charges may here be inserted as follows: "The said C. D. absolutely refuses so to do; and he at times pretends that the said messuage or tenement and all the out-houses and out-buildings thereunto belonging and all the buildings, fences, gates and stiles on the said lands have been constantly during his possession thereof and now are in good repair and condition, and that he hath never ploughed up any part of the said demised lands which he was not at liberty to plough by the terms of the said lease, and the course of husbandry used and approved in the neighborhood thereof, and that he hath never in any manner neglected the manuring or taking care of any part thereof, but that he hath constantly used and employed cultivated and manured all such lands in a proper regular and careful manner according to the terms of the said lease and a good course of husbandry used and practised in the neighbouring country, and that all the said demised premises are in as good plight and condition in all respects as the same were when he entered thereon. Whereas your orator charges the

now, &c.] All which actings and doings on the part of the said C. D. are contrary to equity and good conscience and tend to the manifest wrong and injury of your orator in the premises. (6) In tender consideration whereof and forasmuch as your orator is remediless in the premises, save by the aid of a court of equity, where matters of this nature are properly cognizable and relievable. (7) To the end therefore that justice be done, your orator prays that the said C. D. be made a defendant hereto, that the said C. D. [and his confederates when discovered] may upon his [their several and respective] corporal oath to the best and utmost of his [their several and respective] knowledge, remembrance, information and belief, full, true, direct and perfect answer make to all and singular the matters aforesaid, and that as fully and particularly, as if the same were here repeated, and he [or they and every of them,] distinctly interrogated thereto.† (8) And your orator further prays that the said defendant may be compelled by the decree of this court to put the said land and premises into good and sufficient repair, and to make satisfaction to your orator for all waste done, committed, permitted or suffered by him on the said land and premises, and all damage done by him, or occasioned thereto by his mismanagement or neglect; and that the said defendant may be decreed to keep the said farm, lands and premises in good and sufficient repair and condition during the continuance of his interest therein, and to manage and cultivate the said land in a proper and husband-like manner according to the terms of the said lease and the

centrany of all such pretences to be the truth. And your orator further charges, that the said farm and premises are now, from the neglect and gross mismanagement of the said defendant, worth to be sold the sum of \$—— less than the same were worth to be sold when the said C. D. first took possession thereof, and that it would cost the sum of \$—— and upwards to put the same into as good plight and condition as the same were in at the time of the date of the said indenture of lease. And your orator further charges that the said C. D. ought to put the said demised messuage, &c., and premises into good repair and condition, and to make a reasonable compensation to your orator for the waste and damage done or arisen thereto. And your orator charges that the said defendant threatens and intends to plough up the other or remaining pasture fields called —— part of the said demised premises, and that he ought to be restrained therefrom, and from committing any further or other waste, spoil or destruction in, upon or to the said farm lands and premises or any part thereof."

[† If particular interrogatories, add "And more especially, in manner aforesaid, to answer and set forth, whether, &c, &c.," propounding interrogatories.]

custom of the country; and that the said defendant, his agents and all others may be enjoined and restrained by the injunction of this court from ploughing up the said — acres forming part of the said demised premises, and from committing or permitting any further or other waste or spoil on or to the said demised premises or any part thereof, and that all proper directions may be given for effectuating the purposes aforesaid; that a writ of injunction may be issued, and that such other, further and general relief may be afforded your orator as the nature of his case may require, or to equity shall seem meet. ⁽⁹⁾ May it please the court to grant, &c., (as in general formula.) And your orator will ever pray, &c.

G. M.

[Add affidavit to this bill. See form on p. 317, *ante*.]

Form of bill by next of kin for account.

⁽¹⁾ *To, &c.* (as in general formula.)

⁽²⁾ Humbly complaining shew unto the court, your orator and oratrices, S. M. — of —, C. M. — of —, and A. L. —, of —, ⁽³⁾ that A. M., late of — was in his life-time and at the time of his death possessed of and well entitled to a considerable personal estate consisting of, &c., (here describe it.) And your orator and oratrices further shew that the said A. M. sometime about the — of the year —, departed this life intestate and without issue, leaving F. M. his wife, one of the defendants herein after named, and your orator his brother, and your oratrices his sisters, and only next of kin him surviving. And your orator and oratrices further shew, that since the death of the said intestate, the said F. M. his wife obtained from the — court of — letters of administration of the goods, chattels and estate of the said intestate, and hath by virtue thereof possessed herself of the personal estate and effects of the said intestate to a large amount and value, and much more than sufficient to pay and satisfy his just debts and funeral expenses. And your orator and oratrices further shew, that*

*The following may be inserted here: "Though — years have expired since the death of the said A. M., and though by the laws of this State, it was the duty of the said F. M. as administratrix of the estate of the said A. M. dec'd, to settle her administration account before proper commissioners, yet she has failed to do so, and that your orator and oratrices being, &c., (following text.)"

being entitled as the brother and sisters of the said intestate to a distributive share of his personal estate, your orators and oratrices have frequently applied in person or by their agents to the said F. M., and requested her to come to a full and true account with your orator and oratrices for the personal estate and effects of the said intestate, and to pay them respectively, their share of the residue of such personal estate remaining after paying all the just debts and funeral expenses of the said A. M., deceased, with which reasonable and just requests your orator and oratrices hoped the said F. M. would have complied. (*) But now so it is that the said F. M. refuses to comply with such requests [*and pretends, &c.] All which actings and doings are contrary to equity and good conscience and tend to the manifest wrong and injury of your orators and oratrices. (6) In tender consideration whereof and forasmuch as your orator and oratrices can only have adequate relief in the premises in a court of equity, where matters of this nature are properly cognizable and relievable. (7) To the end therefore that justice may be done in the premises, your orator and oratrices pray that the said F. M. in her own right and as administratrix of the estate of the said A. M. deceased, may be made a party defendant to this bill, and may upon her corporal oath to the best and utmost of her knowledge, remembrance, information and belief, full, true, direct and perfect answer make to all and singular the matters aforesaid, and that as fully and particularly as if the same were here repeated, and she distinctly interrogated thereto;† (8) that an account may be taken by and under the direction of this court of the personal estate and effects of the said intestate A. M. possessed by or come to the hands of the said defendant F. M. his widow and administratrix, or to the

* This may be omitted, but if it be thought better to insert pretences and charges, then the following may be inserted: "Pretends that the personal estate and effects of the said A. M. were small and inconsiderable and not more than sufficient to pay and satisfy his debts and funeral expenses and that she hath applied all such personal estate and effects in a due course of administration. Whereas your orator and oratrices charge the contrary thereof to be the truth, and so it would appear if the said defendant would set forth as she ought to do, a full and true account of all and every the personal estate and effects of the said intestate which have been possessed or received by the said defendant or by her order or to her use, and of her application thereof."

† If special interrogatories, add: "And more especially in manner aforesaid, to answer and set forth, whether, &c., &c.," (propounding interrogatories.)

hands of any other person or persons by her order or for her use; and also an account of the said intestate's debts and funeral expenses, and that the said intestate's personal estate may be applied in due course of administration; and that the clear residue thereof may be ascertained; and that your orators and oratrices respectively may be paid their respective shares of such clear residue, and that such other, further and general relief be afforded your orator and oratrices as the nature of their case may require or to equity shall seem meet. (*) May it please, &c., (as in general formula) And your orator and oratrices will ever pray, &c.

G. M., p. q.

*Bill of injunction to injoin the creation of a nuisance.**

To the Honorable Creed Taylor, Chancellor of the Richmond and Lynchburg Districts:

Your orator, Thomas Miller, of Powhatan county, humbly complaineth to your Honor that some time in the year 1813, as your orator believes, G. L. Mosby, deceased, and B. Trueheart erected a water grist mill on a small branch of Deep Creek, in the neighborhood of your orator's dwelling—the mill-pond (which covered from 10 to 12 acres of land, as was supposed,) being distant from your orator's residence only 1925 yards, and in a direction south of west $37\frac{1}{2}$ degrees, as appears by a map herewith presented, marked A. Your orator and his family had always enjoyed usual health, being by no means particularly liable to bilious fever, or ague and fever, during the many years they resided where they now do, previously to the erection of the mill aforesaid; but in the year 1815, your orator and his family became extremely afflicted by the above diseases, and continued to be more or less so every summer and fall, as long as the aforesaid pond remained. Such were the afflictions of himself and family, arising mainly, if not wholly, as your orator believes, from the deleterious effects of the before named mill-pond, that having taken the best legal advice on the subject, he deter-

* This bill is a copy of the bill exhibited in the former Court of Chancery, at Richmond, Virginia, in the suit of Miller v. Trueheart, a report of which, on an appeal from the decree of the Chancellor, may be found in 4 Leigh, 569. Though not drawn in accordance with the formula laid down in the books, this bill is here inserted as a specimen of legal drafting in the Virginia State Courts, and as containing all the essentials in a bill in these Courts, for the purpose of injoining the creation of a nuisance.

mined to commence a suit for damages against the owners of the mill on account of the nuisance, thinking thereby to get rid of it altogether. Accordingly, in April, 1823, a suit was instituted against B. Trueheart, half owner of the mill, and Benjamin Mosby and Merit Booker, testamentary guardians of Benjamin Mosby, Jr., De Witt Mosby, and John Wade Mosby, infant children of G. L. Mosby, deceased, and to whom he had bequeathed his half of the aforesaid mill. On the 11th of April, 1824, pending the suit aforesaid, the mill-dam was carried off by a violent rain, and the pond drained. Much of the weed, &c. from the pond was swept down the stream into your orator's low-grounds, south of his house, and yet, nevertheless, during the summer of 1824, or fall, there was not a single case of bilious fever, or ague and fever, as your orator verily believes, on his plantation, although the number of people thereon was upwards of fifty. All these facts were fully proved upon the trial of the cause, (the result of which will appear by reference to the paper marked B. herewith,) by indisputable testimony, a part of which may be seen by examining the affidavits accompanying this bill, and which your orator prays may be taken as part thereof, marked from D. to N. inclusive. Dr. A. Crump, who was examined in chief, stated that he was your orator's family physician, and had been from July, 1819; that he had never known so much disease, of the bilious, intermittent and remittent character, in any family of the number, as had prevailed in your orator's during that period; that he had particularly examined the mill-pond, along with Dr. Ro. Henderson, (whose affidavit is filed herewith,) and your orator's meadow and low-grounds, (which it was attempted to make the *scape-goat* on the trial,) and that he believes the *extraordinary* sickness of the above-described kind in your orator's family, was produced by the mill-pond of Trueheart & Co; that in 1824, from the spring till that time, (12th of October, or thereabouts,) there had been no disease of the sort on your orator's plantation, within his knowledge: and that not many days before the giving of his evidence, he had examined all your orator's family, (black and white,) and saw no symptoms of any such disease. It appears from the paper marked B., before alluded to, that the jury, (after a full investigation of 6 or 7 days, and after two repeated declarations on the part of your orator, through his counsel, that money was not his object—that he only wished to be indemnified for his actual expenditures, and to get rid of the destructive and afflicting

nuisance,) gave a verdict in four hundred dollars damages, and costs. After this decisive expression of opinion, your orator did hope that, inasmuch as the mill-dam was down, the race, fore bay, &c. much out of repair, no damages exacted from the orphans, (not even legal costs,) and the mill when in repair of no great importance, he would never again be subjected to the like afflictions, or any approaching thereto. In this fond hope your orator is about to be disappointed, except he can prevent the mischief by the just and benevolent interposition of a Court of Chancery. Your orator has been informed, and does verily believe, that the aforesaid B. Trueheart, (whether with or without the consent of Benjamin Mosby and Merit Booker, guardians as aforesaid, he does not know,) (but he prays that all may be made defendants to this bill,) intends in a few days to put up the aforesaid mill-dam, again create the nuisance so destructive to your orator and the neighborhood, though it may be less deleterious than formerly, as most of the dead timber has been cleared off the land. The said B. Trueheart is a very wealthy man, and is able to collect force enough to erect the dam in a very short time; and therefore your orator has been advised to make this application in time to prevent him, and as it is much easier to prevent erection than to pull down afterwards.

Your orator further states, that agreeably to our laws, (*vide* R. Code, 2 vol., page 227, sec. 6,) when a mill-dam or mill is destroyed or rendered unfit for public use at any time, unless the owner or occupier thereof begin to rebuild or repair the same within one year, &c., he shall forfeit his right to rebuild, without a new writ of *ad quod damnum*, &c. Now, your orator does not believe that the defendant did *bona fide* begin to rebuild or repair his mill or dam within one year after it was unfit for use. It has been before remarked, that the mill-dam was carried away on the 11th of April, 1824, and from that period the mill has been unfit for use. A few days before the expiration of the year, viz. on the 8th of April, as your orator has been informed, of this present year, 1825, defendant B. Trueheart, without, (also,) as your orator believes, the consent, privity or concurrence of one of the guardians of the joint owners, caused a small portion of dirt to be removed from a part of the old dam into the breach, the amount of which will appear by the affidavits of Wm. McLaurine and Wm. P. Tatum, who saw it a few days after, and which are herewith transmitted and marked X. and Y. and prayed to be made a part of this bill. This the defendant

Trueheart construes into a beginning, being all that has been made, as your orator verily believes; and, indeed, if any other and a real *bona fide* beginning had been made by getting timber, rock, &c., where would have been the necessity of such a shift or evasion as this? If the law means any thing, it cannot be eluded by such a pretext. In consideration of the premises, your orator being remediless, except in a Court of Chancery, prays an injunction to restrain the defendants from rebuilding their dam: First, upon the ground that a Court of Equity ought to interpose in the case of a nuisance, where the law would not afford an immediate nor an adequate remedy until irreparable injury might be done; see Hall's Digest, Index, page 352, sec. 9; which your orator believes to be the case in the present instance; for what can compensate him and his family for injuries like those he has sustained, and who knows but they may be immediate and irreparable, before he can get through another suit at law? 2dly. Upon the ground that the defendant did not, in a *bona fide* manner, with the consent and knowledge of the joint tenants, begin to rebuild or repair their dam within one year from the time that the mill became unfit for use. Your orator, saving and reserving, &c., prays that your Honor would grant an injunction restraining the said Trueheart, Benjamin Mosby and Merit Booker, guardians as aforesaid, them or either of them, or their agents, or the agents of either, from rebuilding or repairing the mill-dam aforesaid, until they answer the premises, and shew cause why they should not be restrained. And your orator, as in duty bound, will ever pray, &c.

TH. MILLER, Powhatan.

May 19th, 1825.

Affidavit.

Powhatan County, to-wit: This 20th day of May, 1825, Thomas Miller personally appeared before me, a Justice of the Peace for the County aforesaid, and made oath that all the allegations in the foregoing bill, stated as coming within his own knowledge, he knows to be true, and all others resting upon the knowledge or information of others, he believes to be true. Given under my hand, this 20th day of May, 1825.

JNO. H. STEGER.

Award of injunction.

At Mrs. Hunter's, 23d May, 1825.

The injunction, as prayed for, is awarded until the further order of the Court.

CREED TAYLOR.

Mr. HENING, Clerk of the Court at Richmond.

A bill for partition. (See Code of Virginia, ch. 124, sections 1—5.)*

(¹) To, &c. (as in general formula.)

(²) Humbly complaining, sheweth, &c. (as in general formula.)

(³) That your orator's father, T. B., was in his life-time seised and possessed of certain real estate lying in the county of ———, (here describe it,) and being so thereof seised and possessed, some time in the year ——— departed this life intestate, leaving your orator and C., H. and J. his only children and heirs at law. That the said H. and J. are infants, under the age of twenty-one years.

And your orator further states, that the said real estate is, as he believes, susceptible of partition amongst the parties entitled thereto; but if it be not, then your orator desires the same to be sold and the proceeds distributed amongst the parties, in proportion to their respective interests therein.

(⁴) In tender consideration whereof, and forasmuch as your orator is remediless in the premises, save by the aid of a Court of Equity, where matters of the kind are alone and properly cognizable, your orator prays that the said C., H. and J. be made parties defendant to this bill, (⁵) and required on their corporal oaths to answer the same, according to the best of their knowledge, remembrances, information and belief, as fully and particularly as if the statements of this bill were here again repeated and the said defendants thereto specially interrogated; that a proper guardian *ad litem* be assigned the infant defendants, to defend their interests in this suit; (⁶) that the said real estate be divided between the parties aforementioned, entitled thereto, and your orator's portion thereof allotted to him; and in case the said real estate be indivisible in kind, that the same be exposed to sale, and the proceeds thereof be distributed among the parties entitled thereto; *that proper process may issue; and that such other, further and general relief may be afforded your orator as the nature of his case may require or to equity shall seem meet. And your orator will ever pray, &c.

G. M., p. q.

* This form may be readily adapted to other cases in which partition is sought. It will be observed, that in this form the prayer of process is interjected in the prayer for relief.

*Bill for an injunction to prevent the infringement of copy-
rights.*

(¹) To, &c. (as in general formula of bills.)

(²) Complaining, &c. (as in general formula.)

(³) That heretofore, in the year of our Lord eighteen hundred and —, certain persons, doing business under the name, style and firm of C., H. and Company, namely, W. H., T. H. C. and C. C. L., all citizens of the said United States, and resident in the said District, published a book, "Adam's Latin Grammar, with some improvements, and the following additions: rules for the right pronunciation of the Latin language; a metrical key to the odes of Horace; a list of Latin authors, arranged according to the ages of Roman literature; tables showing the value of the various coins, weights and measures used among the Romans; by Benjamin A. Gould, master of the Public Latin School of Boston;" being a new edition of a foreign publication, which edition was prepared by the said Benjamin A. Gould, who then was, and still is, a citizen of, and resident in the said United States, and who, at the time of preparing the same, agreed in writing, upon sufficient consideration, that said C., H. and Company should be the exclusive proprietors of, and take out a copyright in their names for the same. A printed copy of the title of which book, being such new edition, the said firm of C., H. and Company, on the seventh of July, A. D. 18—, being then such exclusive proprietors of the same, and solely entitled to a copyright of the same, deposited in the office of the clerk of the District Court of the United States, for the said District of Massachusetts, before the said book had been published, which title was on that day recorded in the said office of the clerk of the said District Court; and the said C., H. and Company caused to be published and inserted in the page immediately following the title-page of the said book, the following words, to-wit: Entered according to act of Congress in the year —, by C. H. & Co., in the Clerk's office of the District Court of Massachusetts; [and within two months from the date of the certificate of such deposit of title, by the clerk of said court, said C., H. and Company caused a copy thereof to be published in a newspaper, printed in Boston, in the said District, for the space of four weeks;*] and, within six months from the publication of the said book,

* To be used in case copyright has been renewed. See Story's Laws U. S. continued by Sharswood, Vol. IV., p. 2221. § 3.

caused a copy of the same to be delivered to the Secretary of State of the United States, to be preserved in the office of that officer, and took all the measures and steps requisite by law for securing the said copyright; and the said firm of C., H. and Company, and their assigns, have had the legal and exclusive right of publishing said book, being such new edition, from the time of the date of the said certificate, to the present time, and by and in virtue of the laws of the United States, in force at the time of obtaining said certificate, and publishing said book, and passed since its publication, the assigns of the said C., H. and Company, and the assigns of such assigns, have the exclusive right of publishing the said book, for the period of fourteen years from the date of said certificate, which period has not yet expired, and also of renewing and prolonging such copyright for the period of fourteen years, from and after the expiration of the said first period of fourteen years.

And the plaintiffs further show, that, by assignments in writing for sufficient consideration, made by the original proprietors, and intermediate assignments in writing, by their assigns, and the assigns of their assigns, from time to time, the assignors, assignees, and proprietors, each and all of them, being residents in, and citizens of the said United States, the plaintiffs, for a valuable consideration, became the sole legal proprietors in their own right, of said copyright, on the seventh day of March, in the year of our Lord eighteen hundred and thirty-three, and ever since that time have been, and now are such sole proprietors, and ever since the said seventh of March, have had, and now have the sole exclusive right of printing, publishing, and exposing to sale, and selling copies of the improvements and additions made and originally published in the said edition of the said work, entitled as aforesaid, in which edition the said Benjamin A. Gould, the editor of the same, made the following, among other additions and improvements, namely: he prefixed rules for accent and rules for the sound of the vowels, detached from the original text, and omitted all that relates to English grammar, as distinguished from the Latin; marked the quantity of the penultimate vowel, in every Latin word, throughout the book, where it was not determined, by being placed before another vowel, a double consonant, or two single consonants; made divisions of the text, by introducing new heads in numerous places; divided the paragraphs in numerous instances, and distinguished parts, as more important, by print-

ing them in larger types; in many instances transposed a part of the text of the original work into notes, gave the English of the nouns declined as paradigms, prefixed remarks on gender to the declension of nouns, arranged the termination of each declension in columns, instead of putting them in transverse lines, as in the original work; added an additional termination in the vocative and ablative cases, in the word *Anchises*; declined the words *opus*, *parens*, *dogma*, and *arundo*, *Dido*, *calcar*, *ætas*, and *vox*, in the third declension, at full length, and gave the English in full to the first two; made a distinct head of heterogeneous nouns, and heteroclite nouns, and made remarks under the latter; declined at length the words *respublica*, *jusjurandum*, *paterfamilias*, *Jupiter*, *bos*, *Orpheus*, *Ædipus*, *Achilleus* or *Achilles*, under the head of heteroclites; added the noun *vepre* to the list of defective nouns, under the head of *diptota*; gave the English of the adjectives declined as paradigms, &c., &c., &c.; and made other alterations and improvements in the said original work.

And the plaintiffs further show, that they being the lawful proprietors of the said copyright, and in possession of the same, having many copies of the said edition of said grammar, with the said additions and improvements, on hand and offered for sale, and always having had on hand, and offered for sale at a reasonable price, a sufficient number of copies of the said grammar, so improved and enlarged, and being in the enjoyment of the profits of the same, J. D. R., L. S., both of said Boston, and J. D. M. W., of Roxbury, in the county of Norfolk, in said District of Massachusetts, booksellers, doing business under the name and style of R., S. and Company, on the fourteenth day of August instant, without the consent and allowance of the plaintiffs, exposed to sale and sold, and at divers times before that time, have exposed to sale and sold divers copies of a work, and still have on hand and offer for sale copies of the same, entitled, *Adam's Latin Grammar*, with numerous additions and improvements, designed to aid the more advanced student, by fuller elucidations of the Latin Classics, by C. D. Cleaveland, A. M., late professor of the Latin Language and Literature, in the University of the City of New York; which is a copy from the said improvements and additions in the first mentioned work; and the printing and selling thereof, and the exposing of the same to sale, are infringements of the said copyright of the plaintiffs; and the said R., S. and W., at the time of making

such sale, and of exposing the said copies of said C.'s edition to sale, knew that the plaintiffs had the copyright aforesaid, and knew the said copies, by them so sold, and exposed to sale, to have been copied from the said work, of which the plaintiffs have a copyright, and knew the printing, exposing to sale and selling the same, without the consent of the plaintiffs, to be an infringement of such copyright, and knew the said copies by them so sold, and so exposed to sale, to have been printed and published without the consent of the plaintiffs.

And the plaintiffs further show, that the said Cleaveland's edition of the said grammar is copied and pirated from the said Gould's, and is an infringement on the plaintiffs' copyright, in the following among other circumstances and particulars, namely: it adopts the same title; it adopts the plan of Gould's work, in omitting the whole of the original work, relating to English grammar, omitting, as the plaintiffs believe, precisely the same passages throughout, particularly, at pages sixteen, eighteen, &c., &c., &c., of said Cleaveland's edition; it has rules of accent, prefixed to the original grammar, after the plan of Gould's edition, some of the rules being substantially taken from Gould's; it follows Gould's plan by prefixing rules for the sound of the vowels, and copies some of the rules literally, and takes others substantially, as in the eleventh page, &c., &c., &c.; and in the appendix to the same, to the amount of thirty pages or more, being a very large proportion of the additions, alterations, and improvements, made by the said Gould in his edition of the said work, belonging to the plaintiffs, as aforesaid. And the plaintiffs further show, that in consequence of the defendants having so exposed to sale and sold the said Cleaveland's edition, the sales of the plaintiffs have been hindered and rendered less in number than they would have been, had the said R., S. and Company not so exposed to sale and sold the said pirated edition. All which acts and doings of the said R., S. and Company, are contrary to equity and good conscience, and tend to the manifest wrong and injury of the plaintiffs in the premises; ⁽⁶⁾ in consideration whereof, and forasmuch as the plaintiffs are remediless in the premises, at and by the rules of the common law, and cannot have adequate relief, save in a court of equity, where matters of this and the like nature are properly cognizable and relievable, &c. ⁽⁷⁾ To the end, therefore, &c. (as in general formula.)* ⁽⁸⁾ That the

* See XLI. and XCIII. Rules Supreme Court U. S. If the draftsman does not deem it proper to follow the form prescribed in 41st Rule, he may adopt the following: "That the said R., S. and W. may be made defend-

said R., S. and W. may be restrained by injunction, from selling or exposing to sale, or causing or being any way concerned in the selling or exposing to sale, or otherwise disposing of, any copies of said Cleaveland's edition of the said work, and that they be ordered and decreed to render an account of the copies of the same that they have sold, and to pay over the profits of such sales to the plaintiffs, and that they be ordered to surrender and deliver up to the plaintiffs all the copies of the said Cleaveland's edition they have on hand, and that they be ordered and decreed to pay the plaintiffs their costs in this suit, and that the plaintiffs may have such further and other relief in the premises, as to this honorable court may seem meet, and the nature and circumstances of the case may seem to require.

(⁹) May it please, &c. (as in general formula.) And your orator will ever pray, &c. G. M., p. q.

(Add affidavit.)

Bill for divorce a vinculo matrimonii, and injunction.†

(1) To the honorable J. B. C., Judge of the Circuit Court for the County of Henrico.

(2) Complaining, sheweth unto the Court, your oratrix A. B. C. wife of A. W.; who sues by B. W. D., her next friend; (³) that she is now twenty-eight years old; at the age of fifteen, she left her father's house, (ran off in common language) with the said A. W., and was married to him, and since that time has been to him a constant, faithful and dutiful wife, and has borne him five children, to wit: Elizabeth now 12 years old, Andrew 10, Amelia 7, Martha 3 and George not quite six months old.

Her husband, on the other hand has been negligent, excessively intemperate in drinking ardent spirits, and insufferably abusive and violent to her, frequently beating and choking her, until to protect her person from violence, and preserve her life, she has been compelled to fly from her residence, and seek refuge in the house of her father, P. F. in the City of

ants to this bill, and required on their corporal oaths, full, true and perfect answer to make to all the statements of this bill, and may set forth, particularly, how many copies of said Cleaveland's edition of said grammar they have sold, and what number they have on hand; and that they may abide such order and decree as the court shall make in the premises.

† This bill is taken from the records of Circuit Court of Henrico county. It contains all material statements, though not strictly formal.

—, where she now is with only her two youngest children with her, being unable to return to her home where the other children are, practically without any protector, as their father passes most of his time in the City of — in notorious dissipation, leaving his children at his house in —. The only property owned by your oratrix, and her husband is, a tract of land in the County of —, containing sixty-three acres and a half, which was procured by the joint labor of your oratrix, and her husband after their marriage, and settled upon your oratrix, as will appear by the deed, of which a copy is herewith exhibited, marked A. Your oratrix further shews, that although the said W. treated her with so much brutality and violence, while she was under the same roof with him, and has compelled her to fly from him to avoid, as she has alleged, personal violence, and save her life, upon various occasions, he still pursues her at the residence of her father, infesting the house and using the most violent and threatening language to her. ⁽⁶⁾ In tender consideration, &c. ⁽⁷⁾ To the end therefore, &c., your oratrix prays that the said A. W. may be made a defendant to this bill, and required to render a full, true and perfect answer to the same upon his corporal oath; ⁽⁸⁾ that he may be enjoined and restrained from interfering with or in any manner molesting her and her children who are with her; that your oratrix may be entirely divorced from him, and the marriage be dissolved; that he may be compelled to deliver up her children to her, and to surrender to her and them for the maintenance of herself and her children, the tract of land before mentioned; and for such other and further relief as her case requires, and to equity may seem meet. ⁽⁹⁾ May it please, &c. And your orator will ever pray, &c.

A. B. C.

[*Add affidavit.*]

Award of injunction.

An injunction is awarded to injoin and restrain the defendant A. W. from removing the infant children, Martha and George W., from the control and possession of their mother, A. B. C., until the further order of the Court.

J. A. M.

To the Clerk of, &c.

Bill to perpetuate testimony.

(1) To, &c. (as in general formula.)

(2) Humbly complaining, sheweth unto the Court your orator, T. H. of, &c., brother of the half blood and devisee named in the last will and testament of T. R., of &c., deceased. (3) That the said T. R. was in his life-time, and at the time of his death, seised or entitled to him and his heirs, of or to divers freehold estates, situate in the several places hereinafter mentioned, and divers other places, of considerable yearly value in the whole, and being so seised or entitled, and being of sound and disposing mind, memory and understanding, he made his last will and testament in writing, bearing date, &c., which was duly executed by him, in the presence of, and attested by — credible persons, whose names are, [*here insert the names of the subscribing witnesses*] and which will, with the attestation thereof, is in the words following (that is to say;) [*stating the will verbatim.*] And your orator further sheweth, that the said T. R. afterwards, and on or about ——— departed this life without revoking or altering his said will, or any part thereof, whereupon your orator by virtue of the said will, became entitled in fee-simple to all his said freehold estates, subject as to such part thereof as aforesaid, to the payment of so much of the funeral expenses, debts and legacies of the said T. R. as his personal estate may fall short to pay; and your orator accordingly, soon after the death of the said T. R. entered upon and took possession of all the said estates, and is now in possession and receipt of the rents and profits thereof and in the possession and enjoyment thereof. And your orator well hoped that he and his heirs and assigns would have been permitted to enjoy the same quietly without any interruption from any person whomsoever. (4) But now so it is, may it please your honors, that T. H., of, &c., who claims to be cousin and heir at law of the said T. R., alleging that he is the only or eldest son of T. H. and M., his wife, both deceased (which said M. H. as is also alleged, was the only child of S. R., who as is likewise alleged, was the only brother of the father of the said T. R. that left any issue) combining and confederating with divers persons unknown to your orator, pretends that the said T. R. did not make such last will and testatment in writing as aforesaid, or that he was not of sound and disposing mind and memory at the making thereof, or that the same was not executed in such manner as by law is required for devising real

s; and therefore he insists that your orator hath not any title to the real estates late of the said T. R. or any thereof, but that on his death the same descended unto the said T. H., as his heir at law. ⁽⁵⁾ Whereas your orator charges the contrary of such pretences to be true. But nevertheless the said T. H. refuses to contest the validity of the said will during the life-time of the subscribing witnesses, and he threatens that he will hereafter dispute the validity of the said will when all the subscribing witnesses are dead, whereby your orator and his heirs and assigns will be deprived of the benefit of their testimony. All which pretences of the said confederate are contrary to equity and good conscience, and tend to injure and oppress your orator in the premises. ⁽⁶⁾ In consideration whereof and forasmuch as your orator cannot perpetuate the testimony of the subscribing witnesses to the said will, without the assistance of a court of equity. ⁽⁷⁾ To the end, therefore, that the said T. H. may show, if he can, why your orator should not have the testimony of the said witnesses perpetuated.

⁽⁸⁾ And that your orator may be at liberty to examine his witnesses with respect to the execution and attestation of the said will, and sanity of mind of the said T. R. at the making the same, so that their testimony may be perpetuated and preserved. ⁽⁹⁾ May it please, &c. And your orator will ever pray, &c.

G. M., p. q.

Bill of review.

⁽¹⁾ To, &c. (as in general formula.)

⁽²⁾ Humbly complaining, sheweth unto the Court your orator A. B., of C. in the county of D., Esq., ⁽³⁾ that in ——— term, in the year ———, W. S. of, &c., (the defendant hereinafter named,) exhibited his bill of complaint in this honorable Court against your orator, and thereby set forth, that, &c. [*Here insert the original bill.*] And your orator being served with a *subpœna* for that purpose, appeared and put in his answer to the said bill, to the effect following: [*Here recite the substance of the answer.*] And the said W. S. replied to the said answer, and issue having been joined, and witnesses examined, and publication duly passed, the said cause was set down to be heard, and was heard before this Court, the ——— day of ——— last, when a decree was pronounced, which was afterwards passed and entered, in which it was decreed and ordered, [*here recite the decree;*]

which said decree your orator humbly insists is erroneous, and ought to be reviewed, reversed, and set aside for many apparent errors and imperfections, inasmuch as it appears by your orator's answer, set forth in the body of the said decree, that [*Here insert the apparent errors.*] And no proof being made thereof, no decree ought to have been made or grounded thereon, but said bill ought to have been dismissed for the reasons aforesaid. ⁽⁶⁾ In consideration whereof, and inasmuch as such errors and imperfections appear in the body of the said decree, and there is no proof on which to ground any decree to set aside the said rent charge, your orator hopes that the said decree will be reversed and set aside, and no further proceedings had thereon. ⁽⁷⁾ To the end, therefore, that the said W. S., &c. ⁽⁸⁾ And that for the reasons, and under the circumstances aforesaid, the said decree may be reviewed, reversed and set aside, and no further proceedings taken thereon, and your orator permitted to remain in the undisturbed possession and enjoyment of the said rent charge. ⁽⁹⁾ May it please, &c. And your orator will ever pray, &c.

G. M., p. q.

Bill by husband of legatees against an executor for payment of legacy.

⁽¹⁾ To, &c. (as in general formula.)

⁽²⁾ Humbly complaining, sheweth unto the Court, your orator, &c., ⁽³⁾ that W. S. late of ———, duly made and published his last will and testament in writing, bearing date on or about the ——— and thereby, amongst other bequests, gave to his nephews and nieces, the children of his late sister M. A., the sum of \$—— each, to be paid to them as they should respectively attain the age of twenty-one years, and appointed E. T. F. of ———, the defendant hereinafter named, the sole executor of his said will, as in and by, &c. And your orator further sheweth unto your honor, that soon after the death of the said testator, the said will was duly admitted to probat in the ——— Court of ——— and the said E. T. F. qualified as executor of the same in the said Court, and the said E. T. F. hath since possessed himself of the personal estate and effects of the said testator, to an amount much more than sufficient for the payment of his just debts, funeral expenses and legacies. And your orator, &c., that after the death of the said testator, your orator intermarried with A. A., who was the niece of the said testator, and one

of the children of the said M. A., the sister of the said testator, in the said will named, and by virtue of such intermarriage, your orator, in right of his said wife, became entitled to demand and receive the aforesaid bequest of \$——. And your orator, &c., that your orator's said wife lived to attain her age of twenty-one years, and that she hath lately departed this life, and that neither your orator nor his said wife received any part of the said legacy; and your orator sheweth, that having obtained letters of administration to his said wife, he hath repeatedly applied to the said E. T. F., for payment of the said legacy, and interest thereon, from the time of his said late wife attaining her age of twenty-one years, and your orator well hoped that such your orator's reasonable requests would have been complied with, as in justice and equity they ought to have been. ⁽⁴⁾ But now so it is, &c., the said defendant refuses so to do, &c. ⁽⁵⁾ Whereas, &c. ⁽⁶⁾ In tender consideration, &c. ⁽⁷⁾ To the end, therefore, &c., (as in general formula.)

⁽⁸⁾ And that an account may be taken of what is due and owing to your orator for the principal and interest of the said legacy, and that the said defendant may be decreed to pay the same to your orator; and if the said defendant shall not admit assets of the said testator sufficient to answer the same, then that an account may be taken of the estate and effects of the said testator which have been possessed or received by the said defendant, or by any other person by his order or to his use, and that the same may be applied in a due course of administration. And that your orator may have all such other and further and general relief in the premises, as the nature of his case may require, or to equity shall seem meet. ⁽⁹⁾ May it please, &c., (as in general formula.) And your orator will ever pray, &c.

J. L.

Bill of interpleader.

⁽¹⁾ To the, &c., (as in general formula of bills.)

⁽²⁾ Humbly complaining, sheweth unto the court, your orator J. R. of the city of Richmond, merchant, (a,) ⁽³⁾ that, on or about the 26th day of June, 1821, your orator purchased of D. S., a defendant hereafter named, a certain

(a) If in United States Courts, see General Formula of Bills.

quantity of coal, then being on board a vessel called the James, amounting to ——— chaldrons, for which your orator agreed to pay the said D. S., the sum of \$1125, and to give his promissory note for such amount, payable in thirty days from the said 26th day of June. That such coal was delivered to your orator, and he paid on account of such consideration money \$100.

And your orator further shows, that sometime afterwards, and about the ——— day of ——— 1821, F. and S. Schermerhorn, of the city of ———, merchants, caused an attachment to be sued out against one William Williams, as an absent debtor, and that afterwards, L. F. and D. B., caused another attachment to be sued out against the said W. W., as an absconding debtor; that warrants were issued in the usual form to W. B., the sheriff of the county of New York, who gave notice to your orator, not to pay over to any person except him the said sheriff, any property or money, of or belonging to the said W. W.; and further, that the said W. B., the sheriff aforesaid, and G. D., the attorney of the said F. and S. Schermerhorn, and the said F. and B., apprised your orator, that the coal so purchased by your orator as aforesaid, of the said D. S., was the property of the said W. W., for whom the said D. S. was only an agent or factor, and insisting and giving notice to your orator, that he would be held liable if he paid the residue of such moneys, or any part thereof, to the said D. S.

And your orator further shows unto your honor, that he made application to the said F. and S. S., and F. and B., for leave to pay over such money to the said D. S., without subjecting himself to any responsibility therefor to them, the said F. and S. S., and F. and B., which they positively refused to do. And your orator also applied to the said D. S., to relieve or secure your orator against the effect or operation of such attachments, and from any further responsibility in the premises, but he, the said D. S., has wholly refused so to do, and has commenced an action at law, in the ——— Court of ———, to recover the balance of the said money agreed upon as the price of such coal.

And your orator further shows, that he has always been willing to pay the balance of such money to such person or persons as should be lawfully entitled to receive the same, and to whom he could pay the same with safety; and he hereby offers to pay the same into this court.

And your orator further shows, that he doth not in any respect collude with either the said D. S., or F. and S. S., or F. and B., touching the matters in question in this cause; that he hath not exhibited this bill at the request of such defendants, or any or either of them, and that he has not been indemnified by such defendants, or any or either of them, but merely of his own free will, and to avoid being molested and injured, touching the matters contained in such bill. ⁽⁶⁾ Wherefore, and as your orator can only have adequate relief in this court, ⁽⁸⁾ to the end that the said defendants may interplead, and settle their rights to the said sum of money, and that your orator may be at liberty to pay the same into this court; and that the said D. S. may be enjoined and restrained from further proceeding in the suit at law, so as aforesaid commenced by him against your orator, and that the said F. and S. S., and F. and B., and D. S., may be enjoined and restrained from commencing any suit against your orator, touching the premises; and that your orator, upon payment into court of such amount, and procuring the said defendants to interplead according to the course of this court, may be decreed to be discharged from all liability to such defendants in the premises, and may have all his costs therein. ⁽⁹⁾ May it please, &c., (as in general formula.)

G. M., p. q.

Add affidavit, as in General Formula of Bills.

Bill of Discovery.

⁽¹⁾ To the, &c., (as in general formula of bills.)

⁽²⁾ Humbly complaining, shew unto the Court, your orators A. M. and C. M. of, &c., ^(b) ⁽³⁾ that, by a certain instrument of assignment, dated the — day of — made between J. D., of the city of Richmond, of the first part, and your orators, of the second part, the said J. D. bargained and sold, assigned, transferred, and set over unto your orators the certain property, goods, choses in action and securities for money therein, and in the schedules thereto particularly mentioned in trust, (*set forth assignment, &c. particularly.*) And your orators further show, that at the time aforesaid, there

^(b) If in United States Courts, see General Formula of Bills.

was due and owing to the said J. D., from one R. B., of the said city of Richmond, a defendant hereafter named, the full and just sum of \$750, being the balance of an account between him the said R. B., and the said J. D., the particulars of which account are set forth in a schedule marked A, hereto annexed, and to which your orators refer. And your orators further show, that they have repeatedly applied to the said R. B., to pay them the aforesaid sum of \$750, so justly due from him, with which reasonable request he has refused to comply; and having so refused, your orators were compelled to, and did commence an action at law, in the superior court of the city of Richmond, for obtaining payment thereof. And your orators charge, that the said R. B. hath pleaded in such suit, and given notice of a set-off in the same, and hath delivered a particular of such set-off, which, down to the date of such assignment, corresponds with the credit side of the account set forth in the schedule hereto annexed, but that such defendant hath included in the said particular, three several items, one of \$50.00, one of \$48.00, and one of \$36.00, being charges for goods delivered in the course of the month of — in the year — for which he claims credit in such action.

Whereas your orators charge, that the said R. B., at the time of the delivery of each and every of such parcels of goods so charged for as aforesaid, knew, and was well apprised of the assignment to your orators, or that he the said J. D., had made some assignment of all his property and effects for the benefit of creditors.

And your orators have no means of proving such knowledge or information, on the part of the said R. B., in the action at law aforesaid, and can only establish the same by means of a discovery from such defendant. And, they are advised, that they cannot safely proceed to the trial of such action without a discovery of the matters herein before stated from such defendant. (7) To the end therefore, (special interrogatory as to knowledge.)

And that such defendant may make a full and true discovery of all the matters aforesaid. (8) May it please, &c., (as in general formula.) And your orators will ever pray, &c.

G. M. p. q.

Add affidavit, as in affidavit to general formula.

Cross bill.

(¹) To the, &c., (as in general formula of bills.)

(²) Humbly complaining, sheweth unto the Court, your orator A. B. of, &c.,* (³) that C. D. of, &c., the defendant hereinafter named, on or about the — day of —, filed his bill of complaint in this honorable court, against your orator, thereby praying; (state the prayer of the bill) and your orator being duly served with process [of subpoena,] appeared and put in his answer thereto, to which answer the said C. D. replied; and issue being thus joined, witnesses were examined on both sides [and the proofs closed;] whereupon the said cause was noticed for hearing by the said C. D., before your honor as by the said bill, and other pleadings and proceedings in the said cause, now remaining filed as of record in this honorable court, reference being thereunto had, will more fully appear.

And your orator further sheweth unto your honor, that the said cause has not yet been heard; and, on or about — the said C. D., by a certain writing of release, bearing date the — day of —, did remise, release, and forever quit claim, unto your orator, his heirs, executors and administrators, the several matters and things complained of, in, and by the said bill of the said C. D., and in question in the said suit, and each and every of them, and of all sums of money then due and owing, or thereafter to become due or owing, together with all, and all manner of actions, causes of action, suits and demands whatsoever, both at law and in equity or otherwise howsoever, which he, the said C. D. then had, or which he should or might at any time or times thereafter have, claim, allege or demand, against your orator, for, or by reason or means of any matter, cause, or thing, whatsoever, from the beginning of the world, to the day of the date of the said deed or writing of release; as by the said release, reference being thereunto had, will appear. And your orator hoped that in consequence of the said release, the said C. D. would not have proceeded in the said suit against your orator; (⁴) but the said C. D., combining and confederating, notwithstanding the said release, threatens and intends to proceed in the said suit, and to bring the said cause on for hearing in

(c) If in United States Courts, see General Formula of Bills.

due course; and he pretends that no such release was ever executed by him, or if so, that the same was obtained by fraud and surprise, and therefore void. ⁽⁵⁾ Whereas, your orator charges that the same was, in every respect, fairly and properly obtained by your orator, and duly executed by the said C. D.

And your orator further charges, that under the circumstances aforesaid, he is unable to put the said release in issue, or to use the same as a plea in bar in the said suit. All which actings and pretences, are contrary to equity and good conscience, and tend to the injury and oppression of your orator.

⁽⁶⁾ In tender consideration whereof, and forasmuch as your orator has no remedy without the assistance of a court of equity, &c.

⁽⁷⁾ To the end therefore, (interrogatories) and that the said release may be established, and declared by this honorable court a sufficient bar to any further proceedings by the said C. D., in the said suit; and that the bill of the said C. D. therein, may, under the circumstances, be forthwith dismissed with costs, (and for general relief.) May it please, &c., (as in general formula.) And your orator will ever pray, &c.

G. M., p. q.

Add affidavit. (See affidavit annexed to general formula.)

*Supplemental bill.**

⁽¹⁾ To the, &c., (as in general formula of bills.)

⁽²⁾ Humbly complaining, sheweth unto the Court, your orator J. R. of the city of Richmond, merchant,† ⁽³⁾ that, heretofore your orator exhibited in this court, his original bill

*The distinctions between supplemental bills and amended bills are pointed out in preceding volume. See sections 355-367. In the Virginia State Courts, the forms of these bills are almost identical, only requiring the substitution of the word "amendment" or "amended," wherever the words "supplement" or "supplemental" occur.

† If in United States Courts, see p. 312. Also section 367 preceding volume. Instead of address as contained in the above form, bills in Virginia State Courts, usually commence with these words: "The supplemental bill of your orator A. B. respectfully sheweth to the court, &c." or "The amended and supplemental bill," or "The amended and supplemental bill and bill of revivor of your orator A. B. sheweth to the court, &c." These forms are convenient in practice as at once shewing the character of the bill.

of complaint against, &c., [setting forth the original bill and proceedings therein after which proceed to state matter which occasions the filing of supplemental bill. If deemed proper (4) charge of confederacy, (5) charging part, and (6) averment of jurisdiction may be inserted. See general formula for these.] (7) To the end therefore, that the said J. B. and M. L. may severally answer all and every the matters and things charged by way of supplement, and that they may discover and set forth, &c., (here add interrogatories.) (8) And that your orator may have full and general relief in the premises, such as the nature of his case may require. (9) May it please, &c., (as in general formula.) And your orator will ever pray, &c.

G. M., p. q.

Amended bill.

See next preceding form and notes thereto.

Bill of revivor †

(1) To, &c. (as in general formula of bills.)

(2) Humbly complaining, sheweth unto the Court, your orator A. B. of the city of Richmond, merchant, ‡ (3) that on or about the — day of —, last past, your orator filed his bill in this honorable court, against L. M. since deceased, and others, stating therein the due execution and acknowledgment by the said L. M., of a certain indenture of mortgage, dated the — day of — in the year 1829, for securing the payment to your orator of the sum of \$3000, lawful money of the United States, according to the condition of a certain bond or obligation therein mentioned, and which indenture of mortgage comprised a house and lot of ground, lying in the — ward of the city of New York; and further stating, that the said L. M. had made default in the payment of the said sum of money, according to the condition of such bond, and thereupon praying (set out the prayer of the bill) as by such bill on file in this court, will on reference appear.

† See sections 368 *et seq.* of preceding volume.

‡ If in United States Courts, see p. 312. See note (†) to form of supplemental bill, as to form, when bill of revivor and supplement united in Virginia State Courts.

And your orator further shows, that the said L. M., being duly served with process, appeared to the said original bill, and put in his answer thereto; and the said cause being at issue, the same came on to be heard on the —, when the court was pleased to order and decree, &c.

And your orator further shows unto your honor, that some proceedings have been had before the commissioner to whom this cause stands referred; but no report hath yet been made thereon. And further, that on or about the —, the said late defendant, L. M., departed this life, leaving B. D., of —, (the defendant herein after named) his heir at law, and without having devised, or in any manner disposed of the equity of redemption of and in the said mortgaged premises.

And your orator further shows unto your honor, that the said suit having become abated by the death of the said late defendant, your orator is, as he has been advised, entitled to have the said suit revived against the said B. D., as the heir at law of the said L. M., and to have the said decree and other proceedings had thereon prosecuted and carried into full effect against the said B. D., in like manner as they could or might have had if the said late defendant had been still living. (s) To the end, therefore, that the said B. D. may show cause, if he can, why the said suit and proceedings therein should not stand and be revived against him as such heir at law of the said late defendant as aforesaid, and be in the same plight and condition as the same were in at the time of the abatement thereof; and that the said suit and proceedings had therein, may stand and be revived accordingly: (s) may it please your honor to grant unto your orator, the writ of *sub-pœna* (a) to revive the same, issuing out of and under the seal of this honorable court, to be directed, &c., thereby commanding the said B. D., by a certain day, [and under a certain penalty, to be therein expressed,] (b) personally to be and appear before your honor, in this honorable court, and then and there to show cause, if he can, why the said suit, and the proceedings therein had, should not stand and be revived against him, and be in the same plight and condition as the same were at the abatement thereof; and further, to stand to and abide such order and decree in the premises as to your honor may seem meet. And your orator will ever pray, &c.

G. M., p. q.

(a) In Virginia State Courts, the writ of *summons*. (b) Omit in bills in Virginia State Courts.

FORMS OF STATEMENT IN BILLS.

The following forms of statement in special cases are also added. They should be used in connection with the General Formula of Bills given on page 312, *ante*.

Statement in bill for specific performance by vendor: That your orator was in the month of November, 1814, and is now seised in fee simple of, *or well able to make* a good title to the messuages and other hereditaments hereinafter mentioned; and that in the month of November, 1814, your orator agreed with [*the purchaser*], of, &c., the defendant hereto, for the sale of the said messuages and premises, and he agreed with your orator to purchase the same, at or for the price or sum of \$5,640; and that articles of agreement in writing were duly signed and sealed by your orator and the said [*the purchaser*]; and the same were in the words and figures following, (that is to say.) And your orator further sheweth, that your orator was ready and willing to give possession of the said farm and premises to the said [*the purchaser*], on the said — day of, &c., and to execute all necessary conveyances according to the said agreement; but the said [*the purchaser*] neglected and refused to take possession thereof, and for that reason your orator got in the crops then on the ground, and otherwise managed the said farm according to a proper course of husbandry, and your orator thereby incurred great expense; and your orator caused a notice to be served on the said [*the purchaser*], on the — day of, &c., and the said notice was in the words and figures following, (that is to say)—(state notice from vendor that he was obliged to harvest the crops, and should hold the purchaser responsible for all expenses;) as by the said notice to which, &c.; and your orator further sheweth, that no part of the said purchase money hath been paid to your orator by the said [*the purchaser*]; and your orator hath frequently, by himself and his agents, applied to the said [*the purchaser*], requesting him specifically to perform the said agreement, and to pay the said purchase money, with interest for the same, after the rate of 6 per cent. per annum, from the — day of, &c., and also the value of the said stock and other things so agreed to be valued as aforesaid, and to reimburse your orator for his expenses in cultivating and keeping in repair the said messuages, farm, tenements and premises; and your orator well hoped, &c.

Statement in bill for lease or sale of lands of persons under disability, agreeably to provisions of Code of Virginia, chap. 128, sec. 2: That the said E. T. is seised (or, jointly seised with R., B. & L.) of certain real estate lying in the ——— of ———, and having thereon, (here describe condition of premises and its boundaries;) that it is clearly to the interest of the said E. T. that the said real estate should be sold; that the said E. T. is possessed of the following other property, real and personal, to-wit: (here state all the property, real and personal, belonging to E. T., who is the person under disability;) that this description contains all the property to which the said E. T. is entitled, as your orator verily believes, [and that the income of the said E. T. will not justify such expenditures upon the premises before described, as would make them available for her support; that the said premises are now in a decaying condition, the houses thereon being greatly dilapidated and every day deteriorating in value, &c., &c. Make these statements, if consistent with the facts of the case, and add any others which may shew the propriety of the sale.]

FORMS OF INTERROGATORIES.

The following are forms of interrogatories which may be used in bills:

To the end, therefore, &c.

Whether the said defendants [], or some, or one and which of them, have or hath, or lately or ever and when, had in their, or some, or one and which of their possession or power, or in the possession, or power of their, or of some, or one, and which of their attorneys, solicitors, or agents, attorney, solicitor, or agent, divers, or some and what deeds, documents, letters, copies of letters, papers, and writings, relating to the matters aforesaid, or some and which of them, or some and what part thereof; and that the said defendants may in manner aforesaid set forth a full and true list or schedule of all such deeds, documents, letters, papers, and writings, relating to the matters aforesaid, or any of them, as are or ever were, in their or any of their possession or power, or in the possession or power of their, or any of their attorneys, solicitors, or agents; and may discover what hath become of such of them as have been, but are not now, in their or any of their possession or power, or in the possession or power of their, or any of their attorneys, solicitors, or agents.

And that the said defendants may in manner aforesaid answer, and set forth a full, true and particular account of all and every the freehold, leasehold and personal estate and effects, which the said [], at the time of his death, was seised, possessed of, interested in or entitled to, together with the natures, kinds, qualities, true and utmost value thereof, and every part thereof, and what parts of the same, and what moneys arisen and produced from the same, or otherwise in respect of the sale thereof, or from the rents and profits thereof, or otherwise in respect of the same, have, and at what times, been received, or come to the hands, possession, or power of the said defendants, or any of them, or of any other person or persons, by their or any of their order, or for their or any of their use, or which might have been received by them or any of them but for their or any of their willful default or neglect; and how, or for what purposes the same and every part thereof hath been applied, disposed of and administered: and what respective balances have been from time to time in the hands of the said defendants, or any of them, or otherwise due from them or any of them, in respect of the matters aforesaid: distinguishing in whose hands the same or any part thereof hath been, and the amount of the balance in each year, and in what manner, and for what purposes such respective balances have been applied, and what interest and profits have been made by them, the said defendants, or any of them, from the use and employment thereof, and what is the total amount or balance in the hands of, or due from them, the said defendants, in respect of the matters aforesaid, and what parts, if any, of the estate and effects of the said [] now remain unsold, or to be got in, and administered, and where, and in whose hands, possession, or power, and why the same has not been got in and received, and what is the amount thereof;—and that the said defendant [], unless he shall admit assets of the said [], deceased, sufficient to answer any balance which may be found due from his estate, in respect of the matters aforesaid, may in like manner set forth an account of his personal estate and effects, and of the produce thereof possessed and received by him the said defendant [], and of the amount or balance due from him in respect thereof.

That the said [*the personal representatives*] may set forth a short particular of the personal estate of the said [], at his decease; and of their receipts in respect thereof, and of their payments thereout, and the amount of the debts due by

the said [] at his decease, and the amount of such debts still unpaid, and by what documents the items of such estate, and of the receipts and payments thereof appear.

That the said [*the trustees*] may set forth a short particular of all the [*freehold and leasehold*] estates, which the said [] was seised of, or entitled unto, at the time of his death, and of all the rents, income and produce of the said real estates, which have been, and in what years and from what estates, received by the said last named defendants, or either of them, or by any other persons, and whom, for their or either of their use, and of the purposes to which the same have been applied, and of the amount due from the said last mentioned defendants on account thereof; and by what books and documents the items of such receipts appear.

FORMS OF PRAYER.

The following are forms of prayer in special cases :

That the said defendants [] may either admit assets of the said [], *deceased*, adequate for that purpose, or that all proper accounts of the estate of the said [] may be taken, and directions given for the payment of what shall be found due as aforesaid.

That the will of the said [*the testator*] may be established, and the trusts thereof carried into execution under the direction of this honorable Court.

That the trusts of the said indenture may be carried into execution under, &c.

That the said defendant may be declared to be a trustee for your orator of the said trust funds and premises comprised in the said indenture of settlement.

That it may be declared that the said sum of \$——, bequeathed to the [] by the said will, hath become applicable to the trusts of the said indenture.

That an account may be taken under the direction of this honorable Court, of, &c.

Of all such parts of the leasehold and personal estate of the said [], and of the moneys arisen and produced therefrom, and of the rents, profits, and produce thereof, as have been possessed or received by the said defendants [], or any of them, or by their, or any of their order, or for their, or any of their use.

Or which, without their, or some or one of their willful default, might have been so received.

That the balance due from the said defendant on such account may be ascertained.

That the said defendants may severally answer and pay into Court the balances which may be found due from them on such accounts.

In case it shall appear that the said rents and profits are insufficient for that purpose, then that it may be declared that the said legacies ought to be raised by sale or mortgage of the said devised estates.

That the said freehold and leasehold hereditaments, or a competent part thereof, may be sold, and all necessary parties may be ordered to join with your orator in executing such conveyances and assurances of the said premises, as may be necessary.

That the outstanding debts, securities, and other the personal estate of the said [] may be got in and converted into money.

That proper directions may be given for the management of the said hereditaments, and for the application thereof and of the rents of the same, to the payment of the said debts, and all other debts of the said [] in a due course of administration.

That all proper directions may be given for effectuating the purposes aforesaid.

That proper directions may be given for the application of the balance which shall be found due from the said defendants on the said account.

That all proper directions may be given for the administration of the estate and effects of the said [], under the directions of this honorable Court.

That the clear residue of the said testator's real and personal estate may be secured for the benefit of the several persons entitled thereto, according to their respective interests therein, pursuant to the trusts of the said will.

That due provision may be made for the investment of the said sum of \$—, under the direction of the Court, and upon the trusts by the said will declared concerning the same.

That it may be ascertained who, in the events that have happened, have become entitled to the said trust estates.

That the said defendant may be declared to have forfeited all his interest in the said trust funds, and that the same, in the events which have happened, have become vested in your orators under the limitations of the said indenture.

That the said sum of \$——, bequeathed to the said defendant [], by the said will, may be declared to be in full satisfaction of the same sum so covenanted to be settled by the said [*the testator*] upon the said defendant by the said marriage articles bearing date, &c.

That the said defendant may be restrained by the injunction of this honorable court from transferring or paying over the said Bank Annuities, or any part thereof, to any person or persons, and from receiving, paying, assigning, disposing, transferring, or in any wise intermeddling with the real and personal estate and effects of the said [], deceased, or any part thereof, and the rents, profits, dividends, or produce of the same respectively, or any part of the same.

That some proper person may be appointed receiver of the personal estate and effects of the said [], deceased, and of the profits, dividends, and produce thereof, [including the share of the said testator in the said co-partnership assets,] and of the rents and profits of the said real estates.

That a receiver may be appointed by this honorable Court to collect, get in, and receive the outstanding personal estate and effects of the said [].

That the said [*the purchaser*] may be decreed to perform specifically on his part the said agreement of the —— day of, &c., and to pay to your orator the said sum of \$——, with interest thereon, at the rate of 6 per centum per annum, from the —— day of, &c.; and that the value of the said stock, and other things so agreed to be valued as aforesaid, and the amount of your orator's expenses in getting in the crops of the said farm of the year 1815, and in otherwise managing the said farm, may be ascertained under the direction of this honorable Court, and that the amount thereof may be paid to your orator by the said defendant, your orator being ready and willing to convey the said premises to the said defendant, or as he shall appoint.

For an injunction.—And that the said C. D. and E. F., their attorneys, agents, and all others, may be restrained by an injunction issuing out of this Court, from proceeding further against your orator, in the said action commenced against him in the said Court of this State, and now pending and at issue therein, for the recovery of the possession of said premises, with their appurtenances; and also from instituting a proceeding in any new or other action at law, for the recovery of the possession of said premises, or any part thereof. And that your orator may have (*prayer for general relief.*) May it please the Court to grant unto your orator the writ of injunction, commanding the said C. D. and E. F., their attorneys, agents, and all others, absolutely to desist and refrain from proceeding further against your orator in the said action as above.

For a ne exeat—in U. S. Circuit Courts.—And that the said defendants may be stayed by the writ of *ne exeat regno*,* from departing out of the jurisdiction of this Court. And that your orator (*prayer for general relief.*) May it please your honor to grant unto your orator the writ of *ne exeat regno* staying the said C. D. and E. F., or either of them, from departing into parts beyond this State, and out of the jurisdiction of this Court, without leave first had.

PRACTICAL NOTES ON BILLS IN EQUITY, &c.

See pp. 250–259; also 281–293; also, pp. 295, 296, 297, 298, 308, 309, 310, 311, *ante*.

Foreclosure of mortgages. A person entitled to a part only of a sum of money secured on mortgage, cannot file a bill for a foreclosure without making the other persons entitled to the residue, parties. *Lowe v. Morgan*, 1 Bro. Ch. Ca. 363. See *Palmer v. The Earl of Carlisle*, 1 Sim. & Stu. 423, and *Spence's Eq. Ju.* vol. II., p. 674.

For cases of bills of foreclosure filed against infants, see *Booth v. Rich*, 1 Vern. 295; *Goodier v. Ashton*, 18 Ves. 33, 2d edit.; *Monday v. Monday*, 1 Ves. & Bea. 228, and 1 Madd. Ch. Pr. 532; also, 11 Lom. Dig. R. P. 399; against married women, 3 P. Wms. 352; 11 Lom. Dig. R. P. 399.

With regard to making all incumbrancers parties, see *Bishop of Winchester v. Beaver*, 3 Ves. 314, '15, 2d edition, and cases there referred to.

* So called in Rules of United States Supreme Court.

To a bill of foreclosure against the principal mortgagor, the mortgagor of another estate as a collateral security is a necessary party. *Stokes v. Clendon*, 3 Swanst. 150 n; S. C. 2 Bro. Ch. Ca. 275 n. All persons having an interest in the equity of redemption must be made parties to a bill of foreclosure. *Calverly v. Phelps*, 6 Madd. 229: in this case, the equity of redemption had been conveyed to trustees upon trust to sell and pay off incumbrances, and divide the surplus amongst certain persons specified, with a power to the trustees to give receipts to purchasers; the *cestuis que trust* were held to be necessary parties to the bill filed by a mortgagee for a foreclosure.

The executors or administrators, and not the heirs of the mortgagee of slaves, should bring the bill to foreclose. *Harrison v. Harrison et als.*, 1 Call, 419. And if there be no executors or administrators, it should be suggested, and the children of the mortgagee should be made parties. *Ibid.*

In a bill to foreclose a mortgage, the devisees of the land mortgaged ought to be parties defendant, and not the executors of the mortgagor. *Graham's executors v. Carter*, 2 H. & M. 6.

Where lands devised to be sold have been sold by one of several executors, all the executors ought to be parties to a suit to foreclose a mortgage previously existing upon those lands. So, also, all the purchasers, in order to be subjected to a ratable contribution to satisfy the mortgage. *Southgate v. Taylor*, 5 Munf. 420.

Upon a bill by mortgagee against mortgagor to foreclose, satisfaction or release presumed from the lapse of twenty years, such presumption being corroborated by other circumstances. *Jones' adm'r. v. Comer's ex'rs.*, 5 Leigh, 350. See II. Lom. Dig. R. P. 398; 4 Kent Com. 182; 12 Ves. 266; 2 Bro. Ch. Ca. 289; *Hughes v. Edwards*, 9 Wheat. 489.

A deed of mortgage containing a clause which provides that after default the mortgagees may enter on the property and receive the rents, issues and profits thereof for their own indemnity, it is contended that no sale should be decreed, unless the profits are inadequate for such indemnity, though there is on the deed an absolute conveyance of the fee, with a defeasance in case of payment. The right of the mortgagees to have a foreclosure and sale, is not impaired by the above-mentioned clause. *Harkins v. Forsyth et als.*, 11 Leigh. 294.

The mortgagee may proceed at law on his bond or covenant, at the same time that he is proceeding on his mortgage in equity; or he may, after a foreclosure and sale, sue at law on his bond for the deficiency. But he cannot, by means of a bill to foreclose, obtain, at once, the whole effect of a suit in equity upon the mortgage, and of a suit at law upon the bond. On the bill to foreclose, he will be confined to the mortgaged subject. Such a suit is not intended to act *in personam*. *Dunkley v.*

Van Buren and als., 3 John. Ch. Rep. 330; Jones, &c. v. Conde and wife, 6 John. Ch. Rep. 77; Hughes, &c. v. Edwards and wife, 9 Wheat. 489; Davis v. Battyne, 2 Russ. & Mye. 76.

A mortgagee of stock is not bound to bring a bill of foreclosure, but may sell it. Tucker v. Wilson, 1 P. W. 261.

The rents and profits received by the mortgagor, or equitable owner in possession of land, and which have accrued before an order of sequestration is made, cannot be recovered from him by the mortgagee or vendor. Clarke v. Curtis, 1 Grati. 289.

Equity of redemption.—It may be stated generally, that every person claiming any interest, legal or equitable, in the property mortgaged under or through the mortgagor, by conveyance, by operation of law or otherwise, that is, in privity of title, has a right to redeem the property in order to make his own claims available, whether those who may have a prior claim to redeem are willing or not. 2 Fonb. 168; 2 Spence's Eq. Jur. 660.

The owner of the equity of redemption of part of the estate in mortgage, cannot separately redeem his part; the mortgagee has a right to insist that the whole of the mortgaged estate shall be redeemed together; else, as Sir Thomas Plumer observed, if the estate were sold in twenty lots, there might be twenty bills. Cholmondeley v. Clinton, 2 Jac. & W. 134, cited by Spence, 2 Eq. Jur. 666.

It is now settled, that the mortgagor cannot file a bill to redeem until after the time fixed for payment of the mortgage money has expired. Brown v. Cole, 14 Sim. p. 428, cited by Spence, 2 vol. p. 668.

In the English Courts, on a bill to redeem, if party plaintiff does not redeem the mortgage by paying principal, interest and costs, ascertained by the master, the bill will be dismissed, which is equivalent to decreeing foreclosure. 1 Mad. Ch. 530. In the Virginia State Courts, the decree will be that, upon the plaintiff's paying what is due on mortgage, &c., then mortgagee shall convey to him mortgaged premises; and if not, then that plaintiff be foreclosed of all equity of redemption, and that the mortgaged premises be sold, &c. See Turner v. Turner, 3 Munf. 66.

As a general rule, there can be no redemption of a mortgage after twenty years possession, Whiting v. White, Coop. 4; Beckford v. Wade, 17 Ves. 99; Anon. 3 Atk. 313; unless circumstances are proved by the mortgagor, showing an acknowledgment of his title by the mortgagee; Barron v. Martin, 19 Ves. 327; or unless the mortgagor has labored under an impediment; and, even in that case, according to Lord Kenyon's opinion, there can be no redemption after ten years from the time the impediment has been removed. Beckford v. Wade, 17 Ves. 99.

On a bill for redemption against the mortgagor of slaves, parol testimony is admissible to prove that a bill of sale appearing absolute on its face, was, in fact, intended as a mortgage; especially, if it appear from

written documents that the mortgagor was suffered to remain in possession of the slaves after such bill of sale was given. *Ross v. Norvell*, 1 Wash. 14.

Specific performance.—Courts of Equity decree the specific execution of contracts in cases where the legal remedy of the party is inadequate. Thus, a contract of land may be specifically executed in Chancery, because each piece of land has a value arising from its local situation and circumstances, peculiar to itself; especially in relation to particular persons. Damages in such case being founded on the mere market value of the property, would not in general be an adequate compensation to the disappointed party; (II. Rob. Pr. 167, and cases cited.) But equity will not, in general, decree in favor of a vendee a specific execution of contract relating to personal chattels, because usually damages given at law would be a perfect compensation in such cases. (See II. Rob. Pr. 167, and cases cited.) Yet there are cases, in the books, in which specific performance of contracts relating to personalty has been enforced in equity, because in the particular cases, damages at law did not afford a complete remedy. (II. Rob. Pr. 168, and cases cited.)

A party who has obtained an *inequitable* bargain, will not be received in a Court of equity to demand its performance. If the inadequacy of consideration be so great as to render the bargain hard and unconscionable, equity will refuse its aid to enforce the contract and will leave the parties to contest their rights in a court of law. 6 John. C. R. 222.

Illegality in a contract will prevent specific performance. II Lom. Dig. R. P. 69.

The remedy in equity must be mutual, and where a bill will lie for the purchaser, it will also lie for the vendor. See *Adderly v. Dixon*, 1 Sim. & Stu. 607. II. Rob. Pr. 168. II. Lomax's Dig. Real Pro. 55. Upon this ground, Lord Redesdale questioned whether, in cases arising under the statute of frauds, the *plaintiff* could have specific performance of an agreement signed by the defendant and not by the plaintiff; *Lawrenson v. Butler*, 1 Sch. & Lef. 20; but it has been ruled that he could, by Chancellor Kent, and the Court of Errors in N. Y. See *Clason v. Bailey*, 14 John. Rep. 489. In case of an infant plaintiff, however, suing by a *next friend*, because the act of filing bill did not bind infant, specific performance of a contract was not decreed. See *Flight v. Bolland*, 4 Russ. 298. II. Lomax's Digest Real Property, 52, 56.

The plaintiff in equity, if he has not performed his part of the agreement, must not only show that he was in no default in not having performed it, but must also allege that he is still ready to perform it. See 1 Fonb. Equity, 391, note d; Sugden on Vendors, 360.

When one person enters into an agreement with another for the benefit of a third person, such third person may come into a court of equity and compel a specific performance. *Hook v. Kinear*, in note, 3 Swanst. 417.

When a bill seeks to charge vendor with loss sustained by reason of purchase-money remaining unproductive in plaintiff's (vendee's) hands, notice to the vendor is essential. See *Powell v. Martyr*, 8 Ves. 145. *Winter Blades*, 2 Sim. & Stu. 393.

If a bill is filed against several purchasers of different lots, at a sale by auction, they may demur for multifariousness. *Brookes v. Lord Whitworth*, 1 Madd. Rep. 88. *Reyner v. Julian*, 2 Dick, 477, and note (b) to Madd. 144.

In *Heaphy v. Hill*, 2 Sim. & Stu. 29, the bill by the lessee for a specific performance was dismissed, not having been filed for more than two years after the treaty had been broken off, and the defendant had refused to perform the contract.

A party, unless he has shewn himself prompt and desirous, cannot call for specific performance. II. Lom. Dig. R. P. 70, 72, 73. See *McCue v. Ralston*, 9 Grat. 436.

As to cases when specific performance will be decreed against infants, lunatics, and husband and wife, see II. Lomax's *Digest Real Property*, 52, 53. When not, at suit of husband and wife, *Watts et als. v. Kinney et ux.*, 3 Leigh. 272.

When a purchaser takes possession, with notice of a defect, which it is ~~not~~ to be remedied, he cannot be compelled to complete his purchase; *Duncan v. Cafe*, 2 Mees. & Wils. 244; and acts of ownership after an authorized possession, are of no importance. *Osborne v. Harvey*, 1 Yo. & Col. C. C., 116, cited by Whitworth, Eq. Pl. note (i) to p. 226.

Defects which are not patent are not ground for resisting specific performance. II. Lom. Dig. R. P. 65.

Deficiency if considerable in the quantity of land sold is a ground for refusing specific performance; *Jackson v. Ligon*, 3 Leigh, 161; II. Lom. Dig. R. P. 60; although the quantity was described *as more or less*. Ibid.

[A deficiency of five acres and a fraction in a parcel described as 41 acres by estimation, more or less, was held not sufficient to refuse specific performance. II. Lom. Dig. R. P. 61.] See 1 Munf. 330; 4 Munf. 332; 2 H. & M. 164; 5 Call, 1; 5 Munf. 342; 5 Leigh, 48, 59.

The contract to be specifically performed must be certain. II. Lom. Dig. Real Prop. 52.

A misdescription of the estate, though without fraud, is an objection to specific performance. II. Lom. Dig. R. P. 58.

Clear mistake and surprise, in a contract for sale and purchase of an estate, is an objection to specific performance, if the substance of the contract be materially affected. II. Lom. Dig. R. P. 66-67. *Graham v. Hendren*, 5 Munf. 185.

Compromise of a doubtful right is a sufficient consideration for a contract that will be specifically performed, though the right turn out on the other side. II. Lom. Dig. R. P. 68.

Saving the honor of a father and his family, a sufficient inducement to a contract that will be specifically enforced. II. Lom. Dig. R. P. 68.

[An agreement to settle boundaries will be specifically enforced. 1 Va. 450.]

The assignee for value of a note given for the purchase money of land, may maintain a suit against his assignor, the vendor and the vendee, for a specific execution of contract, in a case proper for such relief. *Hanna v. Wilson, &c.*, 3 Grat. 243.

The application for a specific execution of a contract, is addressed to the sound discretion of the court. He who asks it must have shown himself prompt and willing to comply with the contract on his part; and the prayer will not be granted if it would be inequitable towards the other party; *Bowles v. Woodson*, 6 Grat. 78: in this case, vendee paid a part of purchase money, and failing to comply further, though required so to do by the vendee, on such failure the vendor disclaimed the contract, but refused to pay back the purchase money paid. Six years after, the vendee seeks to enforce the contract: this was refused; but *held*, the vendee was entitled to have the money he had paid returned to him.

A parol contract for exchange of lands partly executed by delivery of possession and acts of ownership over the land received in possession, specifically enforced in equity. *Parrill v. McKinley*, 9 Grat. 1. In this case, there was a deed executed by one of the parties, conveying his land to the other, and *though not delivered*, it was held a sufficient memorandum in writing to bind the grantor, under the statute of frauds.

Other cases in which specific performance decreed—*Foley v. McKeown*, 4 Leigh, 627; *Smith v. Jones*, 7 Leigh, 165; *Clarke, &c. v. Curtis*, 11 Leigh, 559; *Williams v. Lewis*, 6 Leigh, 686.

Other cases in which specific performance refused—*Moore's adm'r's v. Fitz Randolph and als.*, 6 Leigh, 175; *Payne v. Graves*, 5 Leigh, 561; *Pigg v. Corder*, 12 Leigh, 69; *McCann v. James*, 1 Rob. 256; *Bryan v. Loftus's adm'r's*, 1 Rob. 12.

Discovery.—See Code of Virginia, chap. 176, sec. 38—40. See pp. 252, 253, 254; also p. 303, *ante*. See also *Gregory's adm'r v. Marx's adm'r*, 1 Rand. 355; *Rankin v. Bradford and als.*, 1 Leigh, 163; *Harden's ex'ors v. Harden*, 2 Leigh, 572; *Meze v. Mayse*, 6 Rand. 658; *Bass v. Bass*, 4 H. & M. 478; and *Webster v. Couch*, 6 Rand. 519.

For injunction to judgments at law.—(See Code of Virginia, chap. 179, *passim*.) Courts of equity relieve against judgments at law, not because they were wrong, but because of some new matter which the court of law did not or could not pronounce a judgment on, or which, for some just cause, the party could not bring to the consideration of the court. *Green, J.*, in *Garland v. Rives*, 4 Rand. 316. When a cause has been fully heard and decided in a court of law having competent jurisdiction over the subject, equity will not interfere merely because injustice may have been

done at law. On the contrary, it will refuse its interference upon any ground of which the court of law had cognizance, unless the complainant shew a sufficient excuse for having failed to obtain redress at law. *Kincaid v. Cunningham*, 2 Munf. 1; *Auditor v. Nicholas*, 2 Munf. 31; *Dust v. Conrod and als.*, 5 Munf. 411; *Carr, J., in Chapman v. Harrison*, 4 Rand. 338; *Brown v. Toel's adm'r*, 5 Rand. 543; *Cabell's ex'rs v. Roberts's adm'rs*, 6 Rand. 580; *Taylor, (Ch.) in Yancey v. Fenwick*, 4 H. & M., 423.

In order to obtain a new trial from equity, fraud or surprise must be suggested and proved, or it must appear that some material adventitious circumstance has arisen, which could not have been foreseen or guarded against. *Terrell v. Dick*, 1 Call, 546; 2 H. & M. 139; 2 H. & M. 408; 2 Munf. 253; 2 Munf. 290. When it is shewn that the complainant might have defended himself at law, but for the fraud and surprise practised on him by the opposite party or his agent, this will give equity jurisdiction to relieve against the judgment, if, upon the other circumstances of the case, the party be entitled to relief. II Rob. Pr. 214; also, *King v. Smith and als.*, 2 Leigh, 157; *Poindexter v. Waddy*, 6 Munf. 418; 6 Rand. 1; *Lee v. Baird, &c.*, 4 H. & M. 453; *West's ex'or v. Logwood*, 6 Munf. 491; *Hord v. Dishman*, 5 Call, 279; *Mayo v. Bentley*, 4 Call, 528; *Mason v. Nelson*, 11 Leigh, 227.

[A bill of injunction will lie to restrain proceedings on decree obtained by surprise. *Callaway v. Alexander, &c.*, 8 Leigh, 114.]

Cases in which court of equity has refused relief against judgment because of neglect to defend at law. *Donally v. Ginatt's adm'r.*, 5 Leigh, 359; *Haden v. Garden*, 7 Leigh, 157; *Bierne v. Mann and als.*, 5 Leigh, 364; *Turner v. Davis and als.*, 7 Leigh, 227; *Collins and als. v. Jones*, 6 Leigh, 530; *Morgan v. Carson*, 7 Leigh, 238.

Cases in which court of equity has refused relief, when party plaintiff alleged surprise, when party might have had full redress by suffering a non-suit—*Tarply's adm'r v. Dobyn's*, 1 Wash. 185; *Oswald, &c. v. Tyler, &c.*, 4 Rand. 44.

Refusal of relief against judgment for causes other than neglect to defend at law—*Taylor, (Ch.) in Williamson's adm'r v. Applebury*, 1 Hen. & Munf. 208; *Jordan's adm'r v. Williams*, 3 Rand. 501. See also *Norris v. Hume*, 2 Leigh, 334. In this last case, the plaintiff averred in his bill that "though he was unable to prove the matter of his plea, (a special plea in bar,) on the trial at law, he was then able to prove it," without suggesting fraud, accident, mistake or other circumstance which prevented him from establishing his defence at law—the court held that chancery has no jurisdiction to grant relief in the case.

When material evidence has been discovered after judgment, if the party failed to procure for causes beyond his control, equity will relieve against judgment by granting a new trial: 3 Desau. 310: but if he could

with ordinary diligence have known, and obtained the evidence in time, it is not a sufficient ground for new trial. *D^e Lima v. Glassel's adm'r.*, 4 H. & M. 369. See *Arthur v. Chavis*, 6 Rand. 142.

When a purchaser comes into a court of equity for relief against a judgment at law, on the ground of defect in vendor's title to part of the tract of land purchased, it is not enough for him to allege such defect or want of title; but he must prove an actual eviction, or superior title in some other person. *Yancey v. Lewis*, 4 Hen. & Munf. 390. See also *Grantland v. Wight*, 5 Munf. 295.

Sometimes matter arising subsequent to judgment makes its enforcement improper, and there equity will relieve. See *Royall's adm'r's v. Johnson and als.*, 1 Rand. 421; *Miller's ex'r's v. Rice and als.*, 1 Rand. 438; also, *Crawford v. Thurmond and als.*, 3 Leigh, 85.

And any fact which clearly proves it to be against conscience to execute a judgment, and of which the injured party would not have availed himself in a court of law, will justify an application to a court of chancery. *Marine Ins. Co. v. Hodgson*, 4 Cranch, 336, cited II Rob. Pr. 218. See *Royall's adm'r v. Royall's adm'r*, 5 Munf. 82; *Pendleton's adm'r's v. Stuart, &c.*, 6 Munf. 377; *Pickett, &c. v. Stewart, &c.*, 1 Rand. 478.

A court of chancery in Virginia may enjoin a person on whom its process can be served, from proceeding on a judgment of another State. II Rob. Pr. 224.

A State court has no jurisdiction to enjoin a judgment of the circuit court of the United States. *McKim v. Voorhies*, 7 Cranch, 279.

The courts of the United States have no authority to grant injunctions to stay proceedings in any court of a State. 1 Story's Laws U. S. p. 311, s. 5. 4 Cranch, 179.

The county [or corporation] courts of Virginia cannot grant injunctions to a judgment of the superior [circuit] courts. *Hite v. Fitz Randolph*, 1 Virg. Ca. 269. See Code of Virginia, chap. 179, sec. 4.

Though a court of equity will not award an injunction to a judgment at the instance of a person who was not a party thereto, yet a person standing in that situation may obtain an injunction to enjoin the proceedings under a particular execution, if he should be aggrieved thereby. *Jordan's adm'r v. Williams*, 3 Rand. 501.

As to injunctions to executions, see *Randolph v. Randolph, &c.*, 3 Munf. 99; *Wilson & Trent v. Butler, &c.*, 3 Munf. 559; *Allen v. Freeland*, 3 Rand. 175; *Harrison v. Sims*, 6 Rand. 506; *Dunn v. Amey and als.*, 1 Leigh, 465; *Hughes v. Pledge and als.*, 1 Leigh, 443; *Chapman v. Worthington*, 4 Call, 327; *Sampson v. Mitchell's ex'or*, 5 Munf. 175.

For an injunction to restrain tenant for life from carrying away slaves. See *Westcott v. Cady*, 5 John. Ch. Rep. 349; *Smith and others v. Daniel*, 2 McCord's Ch. Rep. 149; *Holliday v. Coleman*, 2 Munf. 162; *Taylor*,

(Ch.) in *Mortimer v. Moffatt and wife*, 4 H. & M. 503; *Bishop's ex'or v. Bishop, &c.*, 2 Leigh, 484.

For an injunction to restrain waste.—The modern practice in this country, as well as in England, is to resort to the prompt and efficacious remedy by an injunction bill to stop the commission of waste. 4 Kent. Com. 77.

The question as to what is waste, will in some measure be determined by the circumstances and situation of the country in which property lies. That may not be waste, for example, in an entire woodland country, which would be so in a cleared one. See II Rob. Pr. 228; *Findlay v. Smith, &c.*, 6 Munf. 142, 148. See also *Crouch v. Puryear*, 1 Rand. 258; *Winship v. Pitts*, 3 Paige, 259; *Watson v. Hunter, &c.*, 5 John. Ch. Rep. 169; *Hawley v. Clowes*, 2 Johns. Ch. Rep. 122; *Loomis v. Wilbur*, 5 Mason, 13.

Chancery goes greater lengths than the courts of law, in staying waste. II Rob. Pr. 231.

Chancery will not interpose to restrain waste by a defendant who claims under a title adverse to that of the plaintiff. *Pillsworth v. Hopter*, 6 Ves. 51; *Storm v. Mann*, 4 John. Ch. Rep. 21; *Higgins, &c. v. Woodward and wife*, 1 Hopkin's Ch. Rep. 342.

For an injunction to stop or prevent a nuisance.—There is no doubt of the jurisdiction of equity in cases of private nuisance; *Van Bergen v. Van Bergen*, 2 John. Ch. Rep. 272; but public nuisances are public offences, over which the courts of law have had a uniform and undisputed cognizance. *Attorney General v. Utica Ins. Co.*, 2 John. Ch. Rep. 371. See *Beveridge v. Lacey*, 3 Rand. 63; *Wingfield v. Crenshaw*, 4 H. & M. 474.

The cases in which chancery has interfered by injunction to prevent or remove a private nuisance, are those in which the nuisance has been erected to the prejudice or annoyance of a right which the other party had long previously enjoyed. It must be a strong and mischievous case of pressing necessity, or the right must have been previously established at law, to entitle the party to call to his aid the jurisdiction of this Court. Ch. Kent, in *Van Bergen v. Van Bergen*, 3 John. Ch. Rep. 282, cited in II Rob. Pr. 231.

Courts of equity will interfere in the case of a nuisance, where there is a flagrant violation of private right, attended with public injury, *when the law would neither afford an immediate nor an adequate remedy until irreparable injury* might be done. *Wingfield v. Crenshaw*, 4 H. & M. 474. In this case, the plaintiff complained that defendant had raised his mill-dam two feet higher than its accustomed height, by means of which defendant had caused a mill-seat of the plaintiff to be overflowed by the backing of the stream, whereby plaintiff was prevented from building his

mill and the health of the plaintiff's family was affected. The case was certainly a strong one, yet the court held that a suit at law was the proper action, and that "although a court of chancery might interfere in the case of a nuisance where there was a flagrant violation of private right, attended with public injury, when the law would neither afford an immediate nor an adequate remedy until irreparable injury might be done, yet this was not one of these cases," and the injunction was refused. See *Miller v. Trueheart and als.*, 4 Leigh, 569—the bill in which case is copied on page 331, ante, of this volume.

[As to injunction to prevent a nuisance in depriving plaintiff of the use of a water-course, see II. Rob. Pr. 232; *Coalter v. Hunter*, &c., 4 Rand. 58; *Stokes & Smith v. Upper Appomattox Co.*, 3 Leigh, 318; *Coalter v. Hunter*, &c., 4 Rand. 58.

As to injunction to prevent a nuisance in erecting a dam so as to injure plaintiff's mill—see II. Rob. Pr. 232. *Arthur, &c. v. Case, &c.*, 1 Paige's Ch. Rep. 447.]

For an injunction to prevent irreparable mischief.—An injunction will also be awarded in other cases, where great and irreparable mischief would be the consequence of a refusal to enjoin. *Crenshaw v. Slate River Co.*, 6 Rand. 245; II. Rob. Pr. 233, 236.

Account.—A bill for an account will not lie where there is only a single demand on one side, and payments by way of set-off on the other; to authorize equity to take jurisdiction, there must be mutual demands. II. Rob. Pr. 4; *Smith v. Marx*, 2 Rand. 449; *The Presbyterian Church v. Manson, &c.*, 4 Rand. 197; *Poage v. Wilson*, 2 Leigh, 400; *Hickman v. Stout*, 2 Leigh, 6: in which last case there were mutual accounts running through a series of years, and consisting of numerous items of blacksmith's work on the one hand, and on the other hand of various items for articles of country produce, &c. The court of appeals of Virginia sustained the jurisdiction.

Dower.—In Virginia, equity jurisdiction over the subject of dower well established. II. Rob. Pr. 5. See *Heth v. Cocke*, 1 Rand. 354. See II. Rob. Pr. 6—10; Code of Virginia, chap. 110, as to measure of dower and how widow endowed; when widow is entitled to issues and profits; see also *Tod v. Baylor*, 4 Leigh, 498; *Braxton v. Coleman*, 5 Call, 433; *Johnson v. Thomas*, 2 Paige, 377; *Swaine v. Perine*, 5 John. Ch. Rep. 492; *Hale v. James*, 6 John. Ch. Rep. 258.

Partition.—See Code of Virginia, chap. 124; also "Practical Notes to Decrees and Orders," *post*. A partition never affects the interests of third persons. See II. Rob. Pr. 14, and cases cited.

Fraud.—In cases of actual fraud, equity follows the law, and gives relief to the full extent to which a court of law could give relief. *Green, J.*, in *Garland v. Rives*, 4 Rand. 307; *White v. Jones*, 4 Call, 253.

Case of *imbecility of mind, drunkenness, &c.* of one of the contracting parties, in which equity has relieved—*Samuel v. Marshall, &c.*, 3 Leigh, 567.

Inadequacy of price, though not so gross as to be *ipso facto* proof of fraud, coupled with other circumstances, a ground for relief. See *McKinney v. Pinckard's ex'or*, 3 Leigh, 149.

Persons selling expectant interests relieved in equity—*McKinney v. Pinckard's ex'or*, 3 Leigh, 149; *Beverley v. Rennolds*, Wythe's Rep. 105.

[Before the recent Code of Virginia,] it was well settled as a general rule, that a creditor at large, one who had not in some way acquired a right to have satisfaction out of his debtor's property specifically, could not come into a court of equity to impeach any conveyance on the ground of fraud. *Green, J.*, in *Tate v. Liggat, &c.*, 2 Leigh, 99; *Carr, J.*, in *Rhodes v. Cousins*, 6 Rand. 190; II. Rob. Pr. 18, 19. This general rule was liable to an exception, in case of a debtor who, by removal out of the State or by evading the process of law, put it out of the power of the creditor to obtain a judgment at law, when a creditor at large might institute a suit in equity to set aside a conveyance made by the debtor. *Cabell, J.*, in *Kelso v. Blackburn*, 3 Leigh, 312. By the Code of Virginia, ~~chap. 170, even by a creditor, before obtaining a judgment or decree for his claim, may institute any suit to avoid a gift conveyance, assignment or transfer of, or charge upon, the estate of his debtor, which he might institute after obtaining judgment or decree; and he may in such suit have all the relief in respect to said estate, which he would be entitled to after obtaining a judgment or decree for the claim which he may be entitled to recover.~~

Case in which the person who was the personal representative of a grantor, and also a creditor of the grantor, was allowed in equity to impeach the deed of the grantor—*Shields, adm'r of Waller, &c. v. Anderson, adm'r, &c.*, 3 Leigh, 729.

As to fraudulent breach of trust by executor, trustee or guardian, see II. Rob. Pr. 22, *et seq.*; *Hudson and als v. Hudson's adm'r*, 5 Munf. 180; *Dandridge, &c. v. Minge*, 4 Rand. 397; *Knight v. Yarbrough*, 4 Rand. 566; *Sale v. Roy*, 2 H. & M. 69; *Dodson, &c. v. Simpson, &c.*, 2 Rand. 294; *Jones v. Hobson*, 2 Rand. 506; *Broadus, &c. v. Rosson, &c.*, 3 Leigh, 12. There is a settled difference between a sale by an executor and one by a trustee. Constructive notice will avoid the trustee's sale, while fraud must be established in the other case. II. Rob. Pr. 23; *Graff and als. v. Castleman, &c.*, 5 Rand. 195.

As to purchaser with notice of another's prior equitable right—II. Rob. Pr. 26; *Noland v. Cromwell*, 4 Munf. 161; *Curtis v. Jones's ex'or*, 6 Munf. 42; *Bumgardner and als. v. Allen*, 6 Munf. 83.

Purchaser for valuable consideration, without notice of another's prior equitable right, protected—Hose & Harrison v. Pierce's adm'r, 1 Wash. 212; Leve v. Braxton & Ham, 5 Call, 537; Taylor v. Stone, 2 Munf. 314; but he must be a *complete purchaser without notice*; i. e. he must have paid the entire purchase money and received a conveyance. II. Rob. Pr. 27, and cases cited. See Mutual Ass. Co. v. Stone, 3 Leigh, 235; see also 1 Munf. 88 and 363. *Quære*: If, under present statute of Virginia, Code of Virginia, chap. 119, sec. 1, a conveyance be made and properly recorded, expressing on its face that part of the purchase money is yet due, and afterwards the grantee receive notice of prior equitable claim, what the duty of purchaser in such case? will he be protected in *ANY* case, if he pay over the residue unpaid to his grantor? and whether, in any such case, the conveyance could be vacated by a prior equitable claimant?

As to fraudulent misrepresentation made at the time of contract, which causes damage, see II. Rob. Pr. 30; Lang v. Lee, 3 Rand. 410.

As to owner standing by and allowing a purchase to be made without asserting a claim—II. Rob. Pr. 30; Engle v. Burns, 5 Call, 463; Taylor v. Cole, 4 Munf. 351; Dickinson v. Davis and als., 2 Leigh, 401; Green v. Price, 1 Munf. 449; Stuart v. Luddington, 1 Rand. 403. In some ~~cases where improvements were made by another, and being~~ guilty of gross laches in asserting his claim, has been ~~compelled to com-~~ pensate party in possession for such improvements. Morris and als. v. Terrill, 2 Rand. 14. See Southall v. McKeand, 1 Wash. 336. Another case in which party in possession was not allowed for improvements, knowing that he had neither legal nor equitable title. There was evidence, too, shewing that party in possession knew the defendants to be the persons who had the title. McKim v. Moody, 1 Rand. 58.

Mistake.—As to cases in which courts of equity will relieve against mistake, see II. Rob. Pr. 32-39, and the following cases: Mutual Assurance Co. v. Mahon, 5 Call, 619; Hunt v. Rousmanier, 1 Peters, 13; Finley v. Lynn, 6 Cranch, 238; Argenbright v. Campbell and wife, 2 H. & M. 144. A mistake "arising from ignorance of law," is not a ground for relief. 1 Peters, 15; Shotwell v. Murray, 1 John. Ch. Rep. 512; Lyon, &c. v. Richmond, &c., 2 John. Ch. Rep. 60; Storrs, &c. v. Barker, 6 John. Ch. Rep. 166. *Contra*: Landsdown v. Landsdown, Mosely, 364; Disell's ex'ors v. Casey, &c., 3 Desau. 84. Mistake corrected against a surety; Harrison, ex'or of Minge v. Field, 2 Wash. 136; Moses v. Libenguth, &c., 2 Rawle, 428; Sumner v. Powell, 2 Meriv. 30; Wiser v. Blachly, &c., 1 John. Ch. Rep. 607. Surety of public functionary not charged on bond of principal, if bond invalid as a statutory bond and absolutely void in law. Commonwealth v. Jackson's ex'or and als., 1 Leigh, 485.

Accident.—As to cases in which courts of equity will relieve against accident, see II. Rob. Pr. 39-43. *When bond or other deed is lost*;

Toulman v. Price, 5 Ves. 238; Shields v. Commonwealth, 4 Rand. 541; Harrison, ex'r of Minge v. Field, ex'x, 2 Wash. 140; Taliaferro v. Foote, 3 Leigh, 58. If bill be simply for discovery and delivery up of deed and no other relief, an affidavit to bill not necessary: Godfrey v. Turner, 1 Vern. 247; II. Rob. Pr. 40; but if for relief generally upon lost deed or bond, &c., affidavit is necessary. Dormer v. Fortescue, 3 Atk. 132; Whitchurch v. Golding, 2 P. Wms. 541. *When bank notes are lost*: Bank of Virginia v. Ward, 6 Munf. 166; Farmers' Bank v. Reynolds, 4 Rand. 186. *Accidents other than loss of instruments*: Madison, &c. v. Vaughan, 5 Call, 562.

Trusts.—See II. Rob. Pr. 50–75; 1 Lomax's Dig. 190–260; II. Ibid. 182, 325; Lewin on Trusts, *passim*; Hill on Trustees, *passim*. Tate's Ans. Dig. Index, II. vol. p. 217–225.

Wills.—As to bills to contest or set up wills, see II. Rob. Pr. 75, 77; also the following cases: Ford v. Gardner, &c., 1 H. & M. 72; Paul, &c. v. Paul, 2 H. & M. 525; Nalle v. Fenwick, 4 Rand. 585; Vaughan v. Green, 1 Leigh, 287. *Where there was no probat*: Banks and als. v. Booth, 6 Munf. 385; Brent v. Dold, Gilm. 211; Lemon v. Reynolds, &c., 5 Munf. 552. See also Givens, &c. v. Manns, 6 Munf. 199.

Disposition of assets of decedents' estates.—See II. Rob. Pr. 77–127. What may be recovered by administrator *de bonis non*: Wernick v. Murdo, 5 Rand. 51; Heffernan's adm'r v. Grymes's adm'r, &c., 2 Leigh, 512. Bill by creditors, (before Code of Virginia:) White, &c. v. Bannister's ex'ors, 1 Wash. 166; 1 Wash. 308; 2 Munf. 326; 6 Munf. 29; 5 Munf. 183; 1 Leigh, 465; 6 Rand. 589; 1 Leigh, 465, 487; Gilm. 174; 2 Leigh, 70; II. Rob. Pr. 86, 87; Provisions of Code of Virginia, see chap. 131, sec. 4, 5, 6, 7, [also sec. 1, 2 and 3;] chap. 130, sec. 13, 14, 15, 16, 17, 18, 19, 21, 22, 23, 24, [also 25 and 26.] Bill by executor or administrator against legatees or distributees: Baker v. Baker, &c., 3 Munf. 222; Robertson and als. v. Archer, adm'r, &c., 5 Rand. 319; Bowers, ex'r v. Glendening and als., 4 Munf. 219. See also Kinney's ex'ors v. Harvey, &c., 2 Leigh, 70; and Trent v. Trent's ex'x, Gilm. 174. *What equitable assets, and how distributed*: II. Rob. 80–86, 87; bill by specialty creditors: Foster, &c. v. Crenshaw's ex'ors, 3 Munf. 514; Blow v. Maynard, 2 Leigh, 57, 66, (but see Code of Virginia, chap. 187, sec. 8 and 9; also chap. 186, sec. 9, 10, as to extent of sale in such case;) bill by simple contract creditors: Trent v. Trent's ex'x and als., Gilm. 188. (See 4 H. & M. 460.) See also Mason's devisees v. Peter's adm'rs, 1 Munf. 437; Chamberlayne, &c. v. Temple, 2 Rand. 396; Winston v. Johnson's ex'ors, 2 Munf. 305; Roberts's widow and heirs v. Stanton, 2 Munf. 129. *Quere*: as to effect which provisions of Code of Virginia will exert on the doctrines of ~~and~~ and equitable assets, &c; bill by legatees against executor or executor's representatives, or against executor,

&c. and his sureties: 3 East. 120; 5 T. R. 690; II. Rob. Pr. 112; 4 Munf. 289; 6 Call, 21; 6 Munf. 45; 2 Rand. 503; 3 Rand. 191. [As to when devises or bequests are void for uncertainty and other questions concerning devises, bequests, wills, &c., see II. Rob. Pr. 89—111; Jarman on Wills; Lomax on Executors]; bill to surcharge and falsify account of executor or administrator: 2 H. & M. 260; 4 H. & M. 253; 4 Munf. 369; (the books abound with such cases; see "Accounts of Executors and Administrators," in Practical Notes to Decrees and Orders, *post*;) bill by legatees against co-legatees who have been paid more than the assets justified: II. Rob. Pr. 115; 2 John. Ch. Rep. 626; 2 P. Wms. 447; bill by legatees against heirs or devisees: William and Mary College v. Hodgson and als., 6 Munf. 163.

Partnership.—Whether a partner can have relief in equity pending the partnership, without praying a dissolution, seems to be questionable: II. Rob. Pr. 128; Harrison v. Armitage, 4 Madd. Ch. Rep. 80. See also Oliver v. Hamilton, 2 Anst. 453; Waters v. Taylor, 15 Ves. 10; Glassington v. Thwaites, &c., 1 Sim. and Stu. 124. Suit by a representative of deceased partner against surviving partner: II. Rob. Pr. 128; Case and wife v. Abeel, 1 Paige's Ch. Rep. 393; Higginson, &c. v. Air, &c., 1 Desau. 429. On a bill filed by the representative of deceased partner, an injunction was awarded to restrain the surviving partner from disposing of the stock and receiving the debts: Hartz v. Schrader, 8 Ves. 317. As to suit by creditor of firm against representative of deceased partner, see II. Rob. Pr. 129; Sale v. Dishman's ex'ors, 3 Leigh, 553; by separate creditor of one partner, who asserts a claim upon partnership effects: II. Rob. Pr. 130; see Nicoll v. Mumford, 4 John. Ch. Rep. 522; and Moody v. Paynes, 2 John. Ch. Rep. 548.

Suretyship.—II. Rob. Pr. 132—141; Croughton v. Duval, 3 Call, 74. The remedies of the surety are impaired if the creditor, after the debt is due, preclude himself from proceeding against the principal for a moment; and in such case the surety will be discharged. Hill v. Bull, Gilm. 149. See also Henry v. Stone, 2 Rand. 464; Samuel v. Howarth, 3 Meriv. 272; Rathbone v. Warren, 10 John. Rep. 587; Hampton v. Levy, 1 McCord's Ch. Rep. 112; Galphin v. McKinney, &c., Ibid. 280. A surety is entitled to every remedy which the creditor has against the principal debtor: II. Rob. Pr. 134; McMahon v. Fawcett, &c., 2 Rand. 530; Loop v. Summers, 3 Rand. 511. *When surety not discharged*; mere negligence of the credit or not sufficient to discharge surety. Bennett v. Maule's adm'r, Gilm. 311. See McKenney's ex'ors v. Waller, 1 Leigh, 434; Norris v. Crummey and als., 2 Rand. 323, where creditor granted indulgence to principal, on a condition which was not performed; Hunter's adm'r's v. Jett, 4 Rand. 104. *Surety's right of substitution*: Eppes, &c. v. Randolph, 2 Call, 125; Tinsley v. Oliver's adm'r, &c., 5 Munf. 419;

Tompkins v. Mitchell, 2 Rand. 428; *Hatcher's adm'r's v. Hatcher's ex'ors*, 1 Rand. 53; *Enders, &c. v. Brune*, 4 Rand. 438; *Blow v. Maynard*, 2 Leigh, 56; *West v. Belches*, 5 Munf. 187; *McMahon, &c. v. Fawcett, &c.*, 2 Rand. 514: as to bill by surety against principal, for money paid, see *Cabell's ex'ors v. Megginson's adm'r's*, 6 Munf. 202; *Mountjoy, &c. v. Banks's ex'ors, &c.*, 6 Munf. 387: bill by surety against co-surety—*McCormack's adm'r v. Obannon's ex'or and devisees*, 3 Munf. 484. See *Farmers Bank v. Vanmeter*, 4 Rand. 553.

Assignment.—In *Winn v. Bowles*, 6 Munf. 23, it was decided that the act in 1 R. C. 1819, p. 484, sec. 5, giving the assignee of a bond the right to sue at law upon the assignment, gave a remedy merely cumulative and additional, to the pre-existing right of assignee to sue in equity. Subsequently, by act, March 5, 1821, assignees were in certain cases prohibited from suing in equity, "unless it shall appear that the plaintiff had not an adequate remedy at law." The present statute is as follows: "A court of equity shall not have jurisdiction of a suit upon a bond, note or writing, by an assignee or holder thereof, unless it appear that the plaintiff had not an adequate remedy thereon at law." Code of Virginia, chap. 144, sec. 16. Assignee takes subject to equity of obligor. *Newton v. Rose*, 2 Wash. 233; *Pickett v. Morris*, 2 Wash. 255. If assignee be *without notice*, the equity must be *clearly* established by proof. *Mayo v. Giles's adm'r*, 1 Munf. 533. But the equity of a third person (not of the original obligor,) cannot be asserted against the assignee, unless he has notice of it expressly or constructively. II. Rob. Pr. 141; 2 John. Ch. Rep. 441; 2 John. Ch. Rep. 479; *Moore, &c. v. Holcombe, &c.*, 3 Leigh, 597. Special circumstances in favor of assignee may modify general rule that assignee takes subject to the equity of the obligor. *Buckner, &c. v. Smith, &c.*, 1 Wash. 296; *Hoomes, ex'or of Elliott v. Smock*, 1 Wash. 389.

Set-off.—When there is no set-off at law, there must be special circumstances of equity to authorize the interference of a court of equity. *Harvey v. Wood*, 5 Madd. Ch. Rep. 279; 2 Paige, 402; II. Rob. Pr. 141. A claim for unliquidated damages is not one of these special circumstances justifying interference of a court of equity. *Webster v. Couch*, 6 Rand. 519; *Cabell's ex'ors v. Roberts's adm'r's*, 6 Rand. 580. *Contra*, *Dunbar v. Buck and others*, 6 Munf. 34. See *Gilliat v. Lynch*, 2 Leigh, 505. In equity, as at law, a joint debt cannot be set off against a separate debt. II. Rob. Pr. 142; *Green, J. in Gilliat v. Lynch*, 2 Leigh, 504; *Poindexter v. Waddy*, 6 Munf. 421. As to set-off against judgment obtained by executor, see *Dangerfield v. Rootes*, 1 Munf. 529; *White, &c. v. Bannister's ex'ors*, 1 Wash. 166. See also *Mackie's ex'or v. Mackie's devisees*, 6 Munf. 265. When insolvency authorizes a court of equity to interfere in matter of set-off—II. Rob. Pr. 144; *Simson v. Hart*, 14 John. Rep. 63;

Lindsay, &c. v. Jackson, &c., 2 Paige, 581. See Ford's adm'r v. Thornton, 3 Leigh, 695.

Suits for freedom.—Code of Virginia, chap. 106. Equity cannot enforce a promise by a master to his slave, that he shall be free on paying a certain sum of money; and though the slave should prove the promise of his master and the payment of the money, he can have no redress. Sawney v. Carter, 6 Rand. 173; Stevenson v. Singleton, 1 Leigh, 72. See Talbert, &c. v. Jenny, &c., 6 Rand. 162; also Patty v. Colin, 1 H. & M. 519; Dunn v. Amey and als., 1 Leigh, 465. It is the settled law in Virginia that a person held in slavery, no matter how long and unjustly, cannot recover damages in the form of profits or otherwise, for his illegal detention in slavery. Cabell, J., in Paup's adm'r v. Mingo, &c. 4 Leigh, 180; Peter and als. v. Hargrave and als., 5 Grat. 12. See further, as to suits for freedom, Dempsey v. Lawrence, Gilm. 333; Hudgins v. Wrights, 1 H. & M. 134.

Husband and Wife.—See II. Rob. Pr. 147–154; Code of Virginia, pp. 502, 513, 514; Clancy on Married Women; Roper Hus. and Wife; McQueen on Husband and Wife; Tucker's Commentaries; Spence's Eq. Jurisdiction; Story's Equity Jurisprudence. When court of chancery will make provision for wife out of her property; see Browning v. Headley, 2 Rob. Rep. 340;* also the following cases: Ex parte Beresford, 1 Desau. 263; 2 John. Ch. Rep. 206; 6 John. Ch. Rep. 33; 3 Cowen, 590; 1 Paige, 166, 463, 620; 2 Paige, 303; protection of wife's property from marital rights, by marriage settlement: Faulkner v. Faulkner's ex'ors. 3 Leigh, 255. When husband and wife sue in right of wife, for title to tract of land, conveyance should be decreed to be made to wife only. Argenbright v. Campbell and wife, 3 H. & M. 144. Where the wife is a joint plaintiff with her husband, she is not bound by any proceedings or admissions in the cause by the husband, if such proceedings or admissions affect her inheritance. A bill by husband and wife is regarded as the husband's suit only, and the wife is joined for conformity, to be bound only so far as in justice she ought to be bound. Dandridge, &c. v. Minge, 4 Rand. 397. *In suits for divorce:* See Code of Virginia, chap. 109,

* In this case, the doctrine of the English Chancery, that where an absolute equitable interest is given to the wife, the court will not permit the husband to recover it without making a provision for the wife, and that the husband's assignee, whether general or particular, takes his interest subject to the same equity, was recognized as binding upon the courts of this State; and the doctrine carried farther than it was carried in Beresford, &c. v. Hobson, &c., 1 Madd. C. R. 199, by Sir Thomas Plumer, who considered that the court in no case had given the whole to the wife; not even "where the husband has left his wife and gone abroad."

passim. As to alimony, see further, Purcell v. Purcell, 4 H. & M. 507; Almond v. Almond, 4 Rand. 667; Denton v. Denton, 1 John. Ch. Rep. 364.

When wife sues alone, save in special cases, she sues by a *next friend*: 1 Dan. Ch. Pr. 151; Story's Eq. Pl. sec. 63. Difference between the next friend of a married woman and the next friend of an infant: 1 Dan. Ch. Pr. 152.

Infants.—See II. Rob. Pr. 159; Code of Virginia, pp. 523, 524, 535, 648, 676, 680; Tucker's Commentaries; Macpherson on Infants; power of court of chancery to interfere as regards the custody of child: Wellesley v. Duke of Beaufort, 3 Cond. Eng. Ch. Rep. 1. See Code of Virginia, chap. 127, as to guardians and wards. As to legacy to child: is a father as a *natural* guardian, *merely*, entitled to receive it? See Kent, Chancellor, in Genet v. Tallmadge, 1 John. Ch. Rep. 3; also Morell, &c. v. Dickey, *id.* 153; Williams, &c. v. Storrs, &c., 6 John. Ch. Rep. 353; but see Code of Virginia, chap. 127, sec. 7. There can be no doubt that a father appointed by a court of competent authority as guardian of his child, is entitled to receive it: this has never been questioned. II. Rob. Pr. 155. As to power of non-resident guardian: see I. Rob. Pr. edit. 1854, p. 49-51; and as to transfer of property belonging to wards from one State to another: see I. Rob. Pr. edit. 1854, p. 51; Code of Virginia, chap. 129; Sess. Acts 1852, p. 79, ch. 96. Sale of lands of infant coparcener: see Code of Virginia, chap. 124; when by county or corporation court: Code of Virginia, chap. 124, sec. 2; lease and sale of lands of infants in other cases, [by *Circuit* courts of Virginia,] see Code of Virginia, chap. 128, and chap. 127, sec. 3; also Introduction to this work, pp. x, xi. Suit by ward against guardian and sureties; after the guardianship is ended, equity will take cognizance of a suit for settlement of guardianship account and balance thereon: II. Rob. Pr. 158; and when the state of the case is such as to make it necessary, equity will interfere during the infancy of the ward: II. Rob. Pr. 158; Monell, &c. v. Monell, &c., 5 John. Ch. Rep. 297. As to deed from ward to guardian: see II. Rob. Pr. 158; Waller v. Armstead's adm'rs, 2 Leigh, 11.

Infants sue by a *next friend*; they defend by a *guardian ad litem*. See 1 Dan. Ch. Pr.; Story's Eq. Pleading.

Idiots and Lunatics.—See Code of Virginia, chap. 16, sec. 17; also chap. 35, sec. 46, 47, 48. Petition for sale or lease of lands belonging to: Code of Virginia, chap. 85, sec. 46, 47, 48; bill for sale or lease of lands in which idiot or lunatic is interested with others, &c.: see Code of Virginia, chap. 128; release of wife's dower right in case of sale: chap. 128, sec. 9; petition by husband of insane wife wishing to sell real estate to have right of dower released: Code of Virginia, chap. 128, sec. 11. Transfer of property belonging to "insane persons" from one State to another:

I. Rob. Pr. edit. 1854, p. 51; Code of Virginia, chap. 129; also Sess. Acts 1852, p. 79, chap. 96. A committee having voluntarily accepted the office has not a right to be discharged merely because the execution of the trust may have become unpleasant. He must show some good excuse for declining. *Lytle's case*, 3 Paige, 251, cited in II. Rob. Pr. 162.

Suits by or against commonwealth, for lands forfeited or escheated.—See *Hubbard v. Goodwin*, 3 Leigh, 492; *Commonwealth v. Martin's ex'rs*, 5 Munf. 117; Code of Virginia, chap. 113, sec. 31, 32, 33; also Chap. 114. Petition to quiet title to forfeited or escheated lands: Code of Virginia, chap. 114, sec. 5-9.

Proceedings to repeal grants of commonwealth.—See Code of Virginia, chap. 112, sec. 59; also, chap. 112, *passim*.

Partition.—See Code of Virginia, chap. 124.

To settle boundaries.—In Virginia, the Court of Appeals has often recognized the general rule that equity does not interpose in questions involving the title to real property. The jurisdiction respecting the boundaries of lands, it has been declared, must be restricted to those cases in which some equity is raised by the acts of the parties; and this equity must be an equity of the plaintiff against the adversary claimants of the land. He cannot give the court jurisdiction by setting forth in his bill an equity against other persons. *Stuart's heirs v. Coalter*, 4 Rand. 74; II. Rob. Pr. 165.

Bill quia timet—See *Randolph's adm'x v. Kinney*, 3 Rand. 397; see *Fowler and wife v. Saunders*, 4 Call, 361, and *Randolph v. Randolph*, &c. 2 Leigh, 540.

Bill of peace—Courts of equity, in order to put an end to oppression and to prevent a multiplicity of suits, take cognizance, by means of a bill of peace, of questions which involve legal principles only, and are triable in the common law courts. There are only two cases in which this is done: the first is where there have been repeated trials and a satisfactory determination at law, on the point of right; the second is where one general legal right is claimed against several distinct persons, and where each suit would determine only the particular right in question between the plaintiff and the defendant in that suit. *Spencer, J.*, in *Trustees of Huntingdon v. Nicoll*, 3 John. Rep. 595. See *Randolph's adm'x v. Kinney, &c.*, 3 Rand. 395; *Baird v. Bland, &c.*, 3 Munf. 570; *Ambler and als. v. Warwick & Co.*, 1 Leigh, 195. *Alexander, &c. v. Pendleton*, 8 Cranch, 462. See also *Linney's adm'r v. Dare's adm'r, &c.*, 2 Leigh, 588.

Attachments in equity, in Virginia.—See Session Acts of Virginia, 1852, p. 78, amending and altering 11th section of chap. 151, Code of Virginia; see also sections 23, 24, 25, 26, 27 and 28 of chap. 151, Code of Virginia. For form of endorsement by clerk on summons in such case, see *post*. For

other forms under attachment law, see Tate's American Form Book, edit. 1854, p. 107, *et seq.*

Bail in equity, in Virginia.—See Sess. Acts of Virginia, 1851, p. 36, and Sess. Acts, 1852, p. 77. For forms under bail law of Virginia, see Tate's American Form Book, edit. 1854, pp. 150–156.

FORM OF ENGLISH BILL.

Complete form of a bill^a exhibited in the English Courts, against an administrator, for an account of an intestate's effects, by his next of kin.

In Chancery.

To the Right Honorable Charles Christopher Baron Cottenham, of Cottenham, in the county of Cambridge, Lord High Chancellor of Great Britain.(a)

Humbly complaining, shew unto your Lordship your orator and oratrix—That [*the intestate*,] late of, &c., deceased, was at the time of his death possessed of the — Hotel, in, &c., for a residue of a term of years therein, then to come and unexpired, and also of divers quantities of household furniture, linen, plate, china, stock in trade, wines, and liquors, and that he was also possessed of and entitled to other personal property of a considerable amount; and your orator and oratrix shew, that sometime before the month of February last, the said [*the intestate*] died intestate and without issue, and he left [*the administrator*], of, &c., and your oratrix, [], the wife of your orator, his brother and sister, and only next of kin, him surviving;—and your orator and oratrix further shew, that sometime after the death of the said [*the intestate*], it was agreed between your orator [] and the said [*the administrator*], that administration of the personal estate of the said intestate should be granted to the said [*the administrator*], upon the terms expressed in the memorandum herein after set forth, and thereupon a memorandum was signed by your orator [] and the said [*the administrator*], and the same was in the words and figures, or to the purport or effect following, that is to say: Memorandum of agreement made and entered into the 6th day of February, 1816, between [*the administrator*], of, &c., of the one part, and [*the plaintiff*] of the other part;

(a) For forms of address in other courts, see Willis's Equity Precedents, p. 1. Law Library, Fifth Series, vol. 31.

whereas [*the intestate*], late of, &c., hath lately departed this life intestate, leaving the said [*the administrator*], and — the wife of the said [*the plaintiff*], his only next of kin; and it hath been agreed between the said [*the administrator*], and [*the plaintiff*], that the said [*the administrator*], should alone administer to the estate and effects of the said [*the intestate*]; and whereas, it hath been also agreed, that the goods, chattels and effects of the said [*the intestate*], should be sold by auction for the joint benefit and advantage of the said [*the administrator*] and [*the plaintiff*]. Now it is hereby agreed and declared by and between the said parties hereto, that the several goods, chattels and effects of and belonging to the said [*the intestate*], shall be forthwith sold and disposed of by auction, by Mr. —, of — street, auctioneer, and that the proceeds arising from such sale shall be paid to the said Mr. —, to the joint account of the said [*the administrator*] and [*the plaintiff*], for their equal benefit and advantage. As witness our hands, the day and year first above written. And your orator and oratrix shew, that before the said memorandum was signed, the said [*the administrator*], had applied to the Ecclesiastical Court for administration of the effects of the said intestate, and that your orator and oratrix had caused a *caveat* to be entered against his obtaining such administration; but that after the said memorandum had been signed, your orator and oratrix, in pursuance of the said agreement, withdrew the said *caveat*, and thereupon administration of the estate and effects of the said [*the intestate*] deceased, was granted by the proper Ecclesiastical Court to the said [*the administrator*], and by virtue thereof the said [*the administrator*] possessed himself of as much of the personal estate and effects of the said intestate as he could get into his power, and he hath caused the term of years, which the said intestate had in the said — Hotel, together with all the household furniture, linen, stock in trade, plate, china, wines and liquors belonging to the said intestate to be sold; and the proceeds arising from the said sale were very large, and the same have been received by the said [*the administrator*], and the same have not been paid to the said [*the auctioneer*], to the joint account of the said [*the administrator*] and your orator, in pursuance of the said agreement; but the said [*the administrator*] hath thereout paid the debts and funeral and administration expenses of the said intestate, and he hath retained the residue of the said proceeds in his own hands, and applied the same to his own use, and he hath collected and

received divers debts due to the said intestate, and he intends to get in the other outstanding estate and effects of the said intestate, and to apply the same to his own use. And your orator and oratrix have frequently, by themselves and their agents, applied to the said [*the administrator*,] requesting him to account for the proceeds of the said sale, and for the other personal estate and effects of the said intestate;—and your orator and oratrix well hoped that the said [*the administrator*] would have complied with such requests, as in equity he ought to have done.

But now, so it is, may it please your Lordship, the said [*the administrator*] absolutely refuses to comply with such requests, sometimes pretending that the said intestate hath left no personal estate or effects; whereas your orator and oratrix charge the contrary thereof to be true, and that the personal estate, whereof the said intestate died possessed, was of very large value, and more than sufficient to answer and satisfy all his just debts, and funeral and testamentary expenses, and so it will appear if the said [*the administrator*] will set forth an account of the said estate and effects, and of what the same consisted, and the value thereof, and how the same have been sold, paid, applied, and disposed of; but that he refuses to do: And your orator further charges, that the said defendant now hath, or lately had in his possession or power, divers deeds, documents, books, accounts, receipts, vouchers and papers, relating to matters aforesaid, and that if the same were produced, the truth of the matters aforesaid would appear therefrom; but the said defendant refuses to produce the same.

To the end, therefore, that the said defendant may, if he can, shew why your orator should not have the relief hereby prayed, and may, upon his corporal oath and according to the best and utmost of his knowledge, remembrance, information and belief, full, true, direct and perfect answer make to such of the several interrogatories here under written as required to answer; that is to say: Whether, &c. (Interrogate to the stating and charging part, down to the charge as to the possession of documents, and add the common inquiry as to the particulars of the intestate's leasehold and personal estate; and interrogate to the charge as to the possession of documents.)

And that the said defendant may answer the premises; and that an account may be taken by and under the direction of this honorable court, of all the personal estate and effects of the said intestate, which have been received by the said de-

fendant, or by any person or persons by his order, or for his use, or which without his default might have been so received; and that the said defendant may be restrained by the injunction of this honorable court from collecting and receiving any part of the personal estate and effects of the said intestate, and that a proper person may be appointed to receive and collect the same; and that the personal estate and effects of the said intestate may be applied in a due course of administration; and that the clear surplus thereof may be ascertained, and that one moiety thereof may be paid to your orator and oratrix; and that your orator and oratrix may have such further and other relief in the premises as the nature of their case may require and to your Lordship shall seem meet.

May it please your Lordship, &c.

(Pray subpoena and injunction against the administrator.)

Note.—The defendant is required to answer all the interrogatories.

V.

Forms of Demurrers, Pleas, Answers, Disclaimers, &c.

DEMURRERS.

See sections 97—110 of preceding volume.

[In the following forms, (1) denotes introductory part of demurrer; (2) the substance; and (3) the conclusion.]

GENERAL FORMULA OF DEMURRER TO THE WHOLE BILL.

(1) The demurrer of A. of county, (or of B. an infant under the age of twenty-one years, by C. of county, his guardian; or of D. an idiot or lunatic, by E. of county, his committee or guardian; or of E. and F. his wife, of county; or of G. the wife of H., who has duly obtained leave to defend separately from her husband,) to the bill of complaint of M. against the defendant (and others), exhibited in the Court of .

This defendant by protestation not confessing or acknowledging all, or any of the matters and things in the said bill of complaint contained, to be true in manner and form, as the same are therein set forth, [*] doth demur thereto, and for causes of demurrer show: (2) [Here state substance of demurrer, as for instance: "that if the matters stated in the said bill do give the plaintiff any cause of complaint against this defendant, the same are triable and determinable at law, and ought not to be inquired into by this Court."]

Conclusion.

(3) Wherefore, and for divers other errors and imperfections, this defendant demands the judgment of this Court, whether he shall be compelled to make any further or other answer to the said bill, or any of the matters and things therein contained; and prays to be hence dismissed with his reasonable costs in this behalf sustained.

[Signature.]

FORMULA OF DEMURRER TO PARTS OF BILL, WITH ANSWER.

(1) Follow preceding form as far as asterisk [*], then proceed: (2) As to so much and to such parts of the said bill,

as seeks that this defendant may answer and set forth whether, &c., &c., (here set out particularly all the interrogatories against which the demurrer is pointed;) and prays, &c., (here state clearly the prayer which is objected to;) doth demur, and for cause of demurrer shows, (here set out the causes of demurrer as in the preceding form.)

(³) Wherefore, and for other good causes of demurrer in said bill contained, this defendant prays judgment, whether he shall be compelled to make any further or other answer to such part of the said bill as is so demurred to as aforesaid.

And as to the residue of said bill, the said defendant, not waiving his said demurrer, but relying thereon, for answer to the residue of said bill; (*here proceed as in the ordinary form of answering, taking care to answer no part of the bill which is covered by the demurrer.*)

General demurrer for want of equity.

[See form in section 104 of preceding volume.]

Special demurrèr to so much of a bill as sought a discovery of title deeds for want of proper affidavit.*

[See form in section 105 of preceding volume.]

[*Note.* This form may be readily adapted to any case, in which, to entitle a party to discovery, he should first make an affidavit of his inability to procure elsewhere the documents sought as evidence.]

Demurrer for multifariousness.

(⁴) The demurrer of, &c. (as in general formula.)

(⁵) That it appears by the said bill that the same is exhibited against this defendant and J. H., J. C., T. S. and W. T. for several and distinct matters and causes, in many whereof, as appears by the said bill, this defendant is not in any manner interested or concerned, by reason of which distinct matters the said plaintiff's said bill is drawn out to a considerable length, and this defendant is compelled to take a copy of the whole thereof, and by joining distinct matters together which do not depend on each other in the said bill, the pleadings, orders and proceedings will, in the progress of

* See sec. 103 of preceding volume, as to cases when special demurrer is necessary.

the said suit, be intricate and prolix, and this defendant put to unnecessary charges in taking copies of the same, although several parts thereof no way relate to or concern him.

(*) Wherefore, &c. (conclude as in general formula.)

Demurrer to a bill of interpleader, for want of affidavit that plaintiff does not collude with any of the defendants.

(¹) The demurrer of, &c., [as in general formula.]

(*) That although the said complainant's said bill is upon the face thereof a bill of interpleader, yet the said complainant hath not annexed to his said bill an affidavit that he doth not collude concerning such matters with any of the defendants thereto, which affidavit ought, according to the rules of this Court, as this defendant is advised, to have been made by the said complainant, and annexed to the said bill: And for further cause of demurrer, this defendant further sheweth that the said bill does not contain sufficient matter of equity whereupon this Court can ground any decree in favor of the said complainant, or give the said complainant any relief against this defendant.

(*) Wherefore, &c. [conclude as in general formula.]

Demurrer to bill on the ground that the disclosure sought will subject defendant to pains and penalties, &c.

(¹) The demurrer of, &c. (as in general formula, to asterisk, then proceed :) As to so much and such part of the said bill as seeks to have discovery from this defendant of any, &c. (here set forth matter in bill, which, if answered, will subject defendant to pains, &c.,) doth demur, and for cause of demurrer sheweth that by the known and settled rules of this court, no person ought to be compelled to set forth or discover any matter or thing which doth or may subject him to any pains, penalties or forfeitures whatsoever; and therefore, as the said discovery sought by the said complainant's said bill doth and may, by the known law of this State, subject and make this defendant liable to several pains, penalties and forfeitures, (*) this defendant doth demur in law to so much and such parts of the said bill as pray the aforesaid discovery, and humbly demands the judgment of this honorable court, whether he ought to be compelled to make any further or other answer than as aforesaid, to such parts of the said bill as he hath so demurred unto. (If answer as to the residue of bill, proceed as in formula, p. 382.)

Demurrer to a bill of review, on the ground that there are no errors in the decree.

(¹) The demurrer of, &c. (as in general formula.)

(²) That there are no errors in the record and premises, and in the decree of the — day of —, in the said bill of review and supplemental bill mentioned, nor is there any sufficient matter alleged in the said bill of review and supplemental bill to entitle the said complainant to reverse the said decree; and for divers other errors and defects appearing in the said bill of review and supplemental bill, these defendants do demur in law thereto.

(³) Wherefore, &c. (as in general formula, to conclusion.)

PLEAS.

See sections 120–131 of preceding volume; also p. 401, *post*.

[In the following forms, the figure (¹) denotes the commencement of plea, (²) the substance of plea, and (³) the conclusion of plea:]

GENERAL FORMULA OF PLEAS.

(¹) The plea of A. B. a defendant to the bill of complaint exhibited against him by X. Y. in the — Court of —.*

This defendant by protestation, not confessing or acknowledging all or any part of the matters and things in said bill of complaint contained to be true in manner and form as the same are therein set forth, for plea nevertheless to the said bill, doth plead and aver, (²) that, &c., (here state substance of plea, as in future forms.) (³) Wherefore, this defendant prays judgment of this honorable court, whether he shall be compelled to make any further or other answer to the said bill, and prays to be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

G. M., p. q.

The foregoing formula may be used in every description of pleas, whether in abatement or in bar. The beginning and the conclusion in all pleas are alike. The following are forms

* See section 120, preceding volume, for forms of pleas when two or more defendants file the same plea, when man and wife plead the same plea, and when plea and answer united.

of the substantial parts of pleas which should be used in connection with this formula :

Pleas in abatement.

1. *Infancy of complainant*: (Commence as in general formula, then proceed :) (2) That the said complainant, at the time of filing his said bill, was and now is an infant under the age of twenty-one years, that is to say, of the age of — or thereabout. (Conclude as in general formula.)

2. *Coverture of complainant*.—(Commence as in general formula, then proceed :) (2) That the said complainant, at the time of filing her said bill, was and now is under coverture of one B.; her husband, who is still living, and in every respect capable, if necessary, of instituting a suit in equity in her behalf. (Conclude as in general formula.)

3. *Coverture of defendant*.—(Commence as in general formula, then proceed :) (2) That this defendant, at the time of filing the aforesaid bill, was and now is under coverture of one B., her husband, who is still living and capable of defending this suit in her behalf. (Conclude as in general formula.)

Pleas in bar.

1. *Plea of statute of limitations*.—(Commence as in general formula, then proceed :) (2) That if the complainant ever had any cause of action or suit against this defendant, for or concerning any of the matters in the said bill mentioned, which this defendant doth in no sort admit, such cause of action or suit did accrue or arise above — years before the filing of the said bill, or before serving or suing out process against this defendant, to appear to and answer said bill; nor did this defendant, at any time within — years next before the said bill was exhibited, or process served on, or issued out against this defendant to appear to and answer the same, promise or agree to come to any account for, or to make satisfaction, or to pay any sum or sums of money, for or by reason of the said matters charged in said bill. (Conclude as in general formula.)

2. *Plea of statute of frauds to a parol agreement as to bill seeking discovery or relief as to the agreement*.—(Commence as in general formula.) (2) That neither this defendant nor any person by him authorized, did ever sign any contract or agreement in writing, for making and executing

any sale or conveyance to the complainant, of the land and premises in the bill mentioned and described, or any interest thereof, or to any such effect, or any memorandum or note or writing of any such agreement. (*) (Conclude as in general formula.)

3. *Plea of former suit depending.*—(Commence as in general formula.) (*) That heretofore and before the said complainant exhibited his present bill in this court, to-wit: on the — day of —, the said complainant filed his bill of complaint in this court, against this defendant, and also against —, for the same matters and to the same effect and for the like relief and purpose as against this defendant, as the said complainant prays by his present bill; to which bill this defendant answered, and other proceedings were thereupon had; and the said former bill and proceedings now remain depending in this court, and the said cause is yet undetermined and undismissed. (*) (Conclude as in general formula.)

FORM OF ENGLISH PLEA.—[*New. Ch. Prac. vol. II., p. 134.*]

4. *Plea of purchaser for a valuable consideration, without notice.*—The plea of the defendant F. D. to part, and his answer to the residue of the bill of complaint of J. V. E., of B., complainant.

The said defendant, by protestation, not confessing or acknowledging all or any of the matters or things in the said complainant's said bill of complaint contained to be true, in such manner as the same are therein set forth, as to so much of the said bill as seeks any conveyance or redemption of the manors, &c. in the said bill mentioned, or the rents and services belonging to and parcel of the said manor, or to compel this defendant to set forth any account of the same, or which any way seeks to impeach this defendant's title to the premises, or any part thereof, or to compel this defendant to pay any rent, or arrear of rent, to the said complainants, for or upon account thereof, or which seeks to have copy or counterpart, or the perusal and inspection of any grants, deeds, conveyances, leases, writings, or papers relating to, or which seeks to compel the said defendant to set forth, in *hæc verba*, any grants or conveyances of the premises made by the said complainant's mother, or any of his ancestors, or which seeks any discovery of the leases granted by this defendant, or those under whom he claims, or of any part or parcel thereof, or any other matter inquired after, or which seeks any relief against this defendant, touching the premises, this defendant

doth plead in bar, and for plea thereunto saith, that A. B. was, at the time of the deed and fine herein after mentioned, in possession of the lands and hereditaments herein after mentioned, or in the receipt of the rents and profits thereof, and [here was set forth a deed of conveyance of the 4th and 5th of August, for a valuable consideration, the sum expressed, with the covenants for levying a fine, and farther assurance,] as by the said indentures, when the same shall be produced to this honorable court, (reference being thereunto had,) will appear. And this defendant, for plea, farther saith, that the said A. B., for the better assuring and conveying the said premises to the said T. N. and his heirs, did, in _____ term, duly levy and acknowledge, before the then justices of his then Majesty's Court of C. P., at W., unto the said T. N. and his heirs, one fine, &c., with proclamations thereupon had, according to the form of the statute in that behalf made and provided, of the said manors and premises, by the names of _____, as by the records of the said court may appear, as this defendant verily believes; by virtue of which indentures and fine the said T. N., as this defendant humbly insists, became and was an absolute purchaser of the said manors and premises, for a full and valuable consideration, really paid, as this defendant believes. And this defendant, for plea, farther saith, that he believes the said T. N. did accordingly, soon after the making the said indentures of lease and release, enter upon and take possession of the said manors and premises, and that shortly after he made several leases of several parts of the said premises, for divers terms of years, some of which this defendant believes are not yet expired, [then state the assignment thereof to F. D. upon mortgage, and his purchasing the equity of redemption afterwards,] as in and by the said several indentures and endorsements may more fully appear; but, for greater certainty, touching the said indentures and deeds, so by him pleaded as aforesaid, this defendant craves leave to refer thereto, when the same shall be produced to this honorable court. And this defendant insists that, by virtue of the said last-mentioned indentures and endorsements, this defendant became well entitled, as this defendant humbly insists, to the said manors and premises, during the respective terms of years before-mentioned; and that the said defendant, and his said trustee E. F., by virtue of the said conveyances and assurances to him executed by the said _____, became entitled to the reversion and inheritance thereof, discharged of the equity of re-

demption which belonged to the said , or his assigns, or his heirs at law. And the said defendant doth insist that the said , and those claiming title to the said premises, by, from, or under him, have quietly enjoyed and taken the rents, issues and profits of the premises ever since; and until lately disturbed by the said complainant's original bill of complaint and his amended bill. And this defendant farther saith, this defendant had no manner of notice of the said complainant's right or title to the said premises, or any part thereof, either at law or in equity, which the said complainant hath or ever had to the said manors and premises, or any part thereof, or of any deeds or writings whatsoever, whereby to make the said fine, or other conveyances, executed to the said, &c. the father, or his estate, in the before mentioned premises, any way defeasible, or to make any of the said manors, lands, or tenements, in the said bill mentioned, redeemable by the said , or the said complainant, upon any fines or considerations whatsoever; or that the same, or any part thereof, were ever intended to be redeemable by the said complainant, or any of the said complainant's ancestors, at or before the execution of the said indentures of the 14th July, 1720, to this defendant, by the said ; or at or before the respective times of executing the several before mentioned conveyances to the said E. F., this defendant's trustee, or before this defendant actually paid the said sum of to the said , for the purchase of the respective estates and interests in the said premises. And this defendant farther pleads, and says, that the said had not, to the knowledge or belief of this defendant, any notice of the said complainant's title, or any part thereof, at or before the execution of the said several conveyances and assurances, to him the said, &c. respectively. All which matters this defendant doth aver, and is ready to maintain and prove, as this honorable Court shall think fit to direct. And this defendant doth insist on the said several matters, the length of possession, and quiet enjoyment by this defendant, and non-claim of the said complainant, and doth plead the same, and other the matters and things aforesaid in bar, to so much and such parts of the said bill as aforesaid, and humbly demands the judgment of this honorable Court, whether he shall be compelled to give any farther or other answer to such part of the said bill as is so pleaded unto: and this defendant not waiving his plea, but relying thereon, and for better supporting the same, for answer, &c.

ANSWERS.

GENERAL FORMULA OF ANSWERS.

[For convenience, these forms of answers have been divided into five parts: First, the commencement, denoted thus: (1); Second, the introduction, denoted thus: (2); Third, the substance, denoted thus: (3); Fourth, the conclusion, denoted thus: (4); and fifth, the affidavit, denoted thus: (5).]

(1) *Commencements of answers.*

Ordinary form.—The answer of ———, the defendant, [or, one of the defendants, or, the joint and several answers of ———, the defendants,] to the bill of complaint exhibited against him, [her, or, them,] in the ——— court of ———, by ———, complainants.

When defendant is an infant.—The answer of A. B., an infant under the age of twenty-one years, by ———, her guardian *ad litem*, assigned to defend her in this suit, to a bill exhibited against the said A. B. (and others,) by ———, in the ——— court of ———.

When christian names of some of the defendants have been misstated in the bill.—The joint and several answer of L. M. and J. P., in the bill called L. E. and M. P. and Q. X. to a bill exhibited against them (and others) in the ——— court of ———, by J. W.

Answer of one in his own right and as administrator and guardian.—The answer of G. H. in his own right and as administrator of all and singular the goods and chattels of R. L. deceased, and of the said G. H. as guardian of L. B., to a bill exhibited against him in his own right and as such administrator and guardian, by B. D. in the ——— court of ———.

Answer of husband and wife.—The joint answer of A. B. and Caroline his wife, to a bill, &c. (as before.)

A supplemental (or further) answer.—The supplemental answer of, &c., &c., or, The further answer of, &c., &c.

A plea and answer.—(See section 125 of preceding volume.)

() Introduction to answers.*

This defendant (*or, these defendants*) now and at all times hereafter saving and reserving unto himself (*or themselves, and each of them,*) all benefit and advantage of exception which can or may be had or taken to the many errors, uncertainties and other imperfections in the said complainant's said bill of complaint contained, for answer thereto, or unto, so much and such parts thereof as this defendant is (*or, these defendants are*) advised is or are material or necessary for him (*or, them*) to make answer unto, this defendant (*or, these defendants,*) answering saith, (*or, say,*) &c.

Another form.—This defendant, reserving to himself all right of exception to the said bill of complaint, for answer thereto saith, &c.

() Substance of answer.*

This, of course, varies with each case.

() Conclusion.*

[And this defendant denies all and all manner of unlawful combination and confederacy wherewith he is by the said bill charged, without this, that there is any other matter, cause or thing in the said complainant's said bill of complaint contained, material or necessary for this defendant to make answer unto, and not herein and hereby well and sufficiently answered, confessed, traversed and avoided or denied, is true to the knowledge or belief of this defendant; all which matters and things this defendant is ready and willing to aver, maintain and prove, as this honorable court shall direct, and humbly prays to be hence dismissed, with his reasonable costs and charges in this behalf most wrongfully sustained.]

The foregoing, between brackets, may be used, though it is not the usual practice in this country. In lieu thereof, the following is the form :

"And now, having fully answered the complainant's bill, (and denying all unlawful combination and confederacy as therein charged,*) this respondent prays hence to be dismissed with his reasonable costs in this behalf expended, and he will ever pray, &c."

G. M., p. d.

* When combination is not charged in the bill, omit the member of sentence enclosed within parenthesis.

(2) Affidavit.

Corporation (or county) of _____. This day personally appeared before me, J. W., a justice of the peace (or notary public, &c., &c.) for the corporation (or county) aforesaid, L. H., whose answer is above written, and made oath that the statements contained in the said answer, so far as made of his own knowledge, are true; and that such statements as are made therein from knowledge or information derived from others, he believes to be true. Given under my hand, this ____ day of ____.

An answer by P. C. [an executor,] denying assets and stating that the estate is indebted to the executor.—[Eq. Draftsman, p. 385.]

(1) The answer of P. C., esq., one of the defendants, to a bill of complaint of T. R. complainant, exhibited in the _____ Court of _____.

(2) This defendant now and at all times hereafter, saving and reserving to himself all and all manner of benefit and advantage of exception to the manifold errors, uncertainties, imperfections, and insufficiencies in the said complainant's said bill of complaint contained, for answer thereunto, or unto so much, and such parts thereof, as he this defendant is advised, is material for him this defendant to make answer unto, he this defendant answering, saith, (3) that he denies that A. M. in the said complainant's bill mentioned, was, at the time of making her will, possessed of a considerable personal estate; but this defendant admits that the said A. M. did, on or about the time in the said complainant's bill for that purpose mentioned, duly make and execute her last will and testament of such date, purport, and effect, as in the said complainant's said bill of complaint, is for that purpose particularly mentioned, and that she thereby gave to the said T. R. her brother an annuity or yearly rent-charge of \$ _____ a year, payable quarterly; but the said testatrix A. M. did not, in and by her said will, give any directions out of what particular fund the said annuity of \$ _____ a year should be paid. And this defendant admits that the said testatrix by her said will, gave several other legacies, and thereby, after having devised to her daughter M. M. (now M. P.) her executors, administrators, and assigns for ever, all the rest and residue of her estate, of what nature, kind, or quality

soever, she the said testatrix A. M. appointed him, this defendant, and M. his wife, together with J. R. and T. P. since deceased, joint executors of her said will.

And this defendant further answering saith, that the said A. M. on or about the day of , which was in the year of our Lord , departed this life without revoking or altering her said will, and that soon after the said A. M.'s death, he this defendant together with M. his late wife, J. R. and T. P. duly proved the said A. M.'s will in the ——— Court of ———, and took upon themselves the burthen of the execution thereof; but this defendant absolutely denies that he ever possessed any part of the personal estate or effects of the said A. M. save and except a few household goods of very trifling value, or that to his knowledge, information or belief, the said A. M. died possessed of personal estate or effects to any considerable value, or even sufficient to pay her debts and legacies; but on the contrary, he this defendant saith, that he this defendant did, for the honor and credit of and in respect to the memory of the said A. M. deceased, pay divers sums of his own proper money, as well in discharging several debts of the said A. M. as in the payment of legacies given by her the said A. M. to her poor relations, and also towards the support and maintenance of the said complainant T. R. who is a person in indigent circumstances, imprudently and totally incapable of making a proper use of his money; and for which reason, he this defendant caused such sums of money as he from time to time advanced to the said T. R. to be paid and applied in necessities for him.

And this defendant further answering saith, that his late wife M. C. in the life-time of the said A. M., from her knowledge of the said A. M.'s being in bad circumstances and wanting money, did, for some time before her death, buy with his this defendant's money, provision for the said A. M. and her family, and that the said M. C. also paid the said A. M.'s physician his fees during the said A. M.'s last sickness, likewise with this defendant's money, and for which reason he this defendant is well satisfied that the said A. M. died in very indifferent circumstances, and left little or no personal estate at her death.

And this defendant further answering saith, that he hath heard and believes it to be true, that the said A. M. was in her life-time possessed of some trifling real estate at W., in the county of N., of the value of about \$ a year to which

she was entitled for her life only; and that upon her death the other defendant M. P., as her only daughter and heir at law, became entitled thereto, and this defendant hath likewise heard and believes, that the said A. M. was, at the time of her death, possessed of another freehold estate, left her by the will of — P. deceased, for her life only, and after her decease, to the said defendant M. P. and her heirs.

And this defendant further answering saith, that he knows of no other estate, of which the said A. M. died possessed.

And this defendant further answering saith, that he hath heard and believes that the other defendants J. P. and M. his wife have, since the decease of the said A. M., sold and disposed of the said lands and premises at W. aforesaid.

And this defendant further answering saith, that he this defendant, or the other defendant J. R., to the knowledge, information, or belief of him this defendant, never paid several considerable sums of money, or any sum of money whatsoever, on account of the personal estate of the said A. M., into the hands of the other defendants J. P. and M. his wife, or either of them; neither does this defendant know, or has he ever heard, save by the said complainant's said bill of complaint, that the said M. C. this defendant's late wife, and J. T. deceased, or either of them, did in their respective life-times, out of the personal estate which they received of the said A. M., pay her the said A. M.'s debts and legacies, neither does this defendant know of the said M. C. or the said J. T.'s having ever possessed any part of the said A. M.'s personal estate, (if any she had,) save and except a few household goods which this defendant hath heard and believes they the said M. C. and J. T. in their life-times sold for the sum of \$, or some such small sums of money, as this defendant hath been informed, but which said sum of \$, or any part thereof, never came to the hands, custody, or power of this defendant, neither was this defendant privy to the sale thereof, or ever had or saw, to the best of his remembrance or belief, any written account thereupon, or any inventory of the said household goods, neither can he set forth the particulars thereof, having never been in the possession of the said household goods, or of any inventory or account thereof; but this defendant is well satisfied that the said A. M. was indebted to his late wife the said M. C. in her life-time in a much greater sum of money than the amount of such household goods.

And this defendant further answering saith, that he hath heard and believes, that the other defendant J. R. was in the receipt of the rents and profits of the lands and premises at W. from the death of the said A. M. to the time of the said other defendant J. P. and M. his wife's selling the same; and that he the said J. R. during the time he was so in the receipt of the said rents, did out of such rents and profits pay to, or to the use of the said complainant, the said rent of the said premises, and that by such payments, the said annuity of \$ a year must have been overpaid and unsatisfied to the said complainant. And this defendant submits to this honorable Court, that as he hath possessed no assets of the said A. M. he is in no respect bound to pay the said annuity or to come to any account with the said complainant in respect thereto. And this defendant submits it to this honorable Court that he is well entitled and ought in justice to receive out of the said A. M.'s personal estate, (if she left any,) all such sums and sum of money which he this defendant hath paid for her the said A. M., or on her account. And this defendant denies that he hath been applied to for the several purposes alleged by the said complainant, otherwise than by the said complainant's said bill of complaint. And this defendant denies all and all manner of unlawful combination and confederacy in the said complainant's said bill of complaint charged. (*) Without that, &c.

P. C. (by Counsel.)

(Add Affidavit.)

An answer to a bill for an injunction to stay proceedings at law on a judgment.—[*Alexander's Ch. Pr.* 290.]

(1) The answer of, &c., (as in general formula.)

(2) This defendant, &c., (as in general formula.) (*) That at the term of County Court, he recovered a judgment against the complainant for the sum of being the amount due him, as the holder of certain promissory notes, mentioned and described in the bill of complaint, as drawn by the said complainant, payable to one B, and by him endorsed to this defendant. And as the said judgment was recovered without any fraud on his part, &c., it remains in full force and unreversed, and as all the objections now pretended against it in said bill, were inquirable into at law, and shown to be true, might have been used as defences in his aforesaid action at law, this defendant relies on his afore

said judgment, and pleads the same in bar of all the relief which the complainant now seeks by his bill.

And this defendant avers that he knows nothing whatever of any of the transactions between the complainant and the said B, and out of which the pretended equities of the complainant are supposed to arise, and can neither admit nor deny the charges in the bill in that behalf. He insists that all inquiry into these matters is precluded by the judgment aforesaid, but if it shall be considered by this court that they are still open for examination in this suit, he is advised to insist that the said B is a necessary party to this suit, to aid this defendant in his defence thereof.

And this defendant avers that he acquired the aforesaid promissory notes before they or any of them became payable bona fide, for a full and valuable consideration, and without notice of any of the equities or defences now pretended by the complainant against them; he is therefore advised and insists that his right as the holder thereof cannot be affected by proof now adduced of any latent equities existing between the original parties to the said notes.

And as to the matters of account which are pretended in said bill, to be remaining unsettled between the complainant and this defendant, in respect of which a large balance of money is pretended to be due from this defendant to the complainant; this defendant says that upon the complainant's own showing, they are matters for the cognizance of a court of common law, and he therefore insists that this court has no jurisdiction to examine into them, or to grant any relief to the complainant in respect thereof; and he more especially relies on and pleads the judgment aforesaid against the claim of the said complainant to have the balance to be found due on taking an account of the aforesaid matters set off or discounted from the sum recovered by said judgment.

And this defendant further says that if the complainant ever had any cause of suit or action against this defendant, for or in respect of the aforesaid matters of account or any of them, the same did accrue unto him upwards of — years before the filing of the present bill, or suing out process thereon against this defendant, and upwards of — years before this defendant became the holder of the aforesaid promissory notes, and he pleads the act for limitation of actions and so forth, against all the relief which the complainant seeks in respect thereof.

And this defendant insisting on his aforesaid defences, and praying to have the same benefit thereof as if they were herein specially pleaded, for further answer admits, &c., &c., [here answer the several allegations in the bill; and when the bill charges fraud and combination the answer should deny such fraud, &c.]

And as in duty bound he will ever pray, &c.

[Affidavit.]

An answer of mortgagor to a bill of foreclosure.

(¹) The answer of, &c. [as in general formula.]

(²) This defendant, &c., answereth and saith, he admits it to be true that this defendant did at or about the time in the said bill of complaint in that behalf mentioned, borrow the sum of \$—— from A. W. the elder in the said bill of complaint named, and that thereupon such indenture of bargain and sale and such bond as in the said bill of complaint are set forth, were duly made, and executed by and between this defendant and the said A. W. the elder, and were of such date and to such purport and effect as in the said bill of complaint in that behalf stated; but for his greater certainty nevertheless as to the said indenture and bond and the respective dates, purport and effect thereof this defendant craves leave to refer thereto when produced; And this defendant further answering saith, he admits it to be true that the said A. W. the elder departed this life before payment of the said principal-money or any part thereof; And this defendant further saith it may be true for any thing this defendant knows to the contrary that the said A. W. the elder left A. W. the younger in the said bill of complaint also named his eldest son and heir at law him surviving, and that he had first duly made and published his last will and testament in writing, and thereby appointed the said complainant T. W. and the said A. W. the younger and L. W. since deceased executors thereof, and that the said executors duly proved the said will in the proper Court, and that the said will did not in any manner affect the said mortgaged premises, and that the legal estate and interest therein descended on and vested in the said A. W. the younger, and that such indenture as in the said bill of complaint is stated to bear date, &c. was duly made and executed by and between such parties and to such purport as in the said bill of complaint set forth; and that the said A. W. the younger departed this life at or about

the time in the said bill of complaint in that behalf mentioned, leaving the said complainant G. W. an infant, his only son and heir at law him surviving, and that he had first duly made and published his last will and testament in writing of such date as in the said bill of complaint mentioned, and thereby appointed the said complainants T. W. &c. executors thereof, and that the said complainants duly proved the said will in the proper Court, and that the said will did not in any manner affect the said premises, and that the legal estate and interest therein descended upon and is now vested in the said complainant G. W., and that the said T. W. departed this life soon after the death of the said last-mentioned testator, and that thereupon the said complainant T. W. became also the surviving executor of the said A. W. the elder, but this defendant knows nothing of the said several matters aforesaid save as he is informed by the said bill of complaint, and therefore craves leave to refer the said complainants to such proof thereof as they shall be able to make. And this defendant admits that the said principal sum of \$—— or any part thereof hath not yet been paid, and that the same now remains due and owing from this defendant on the security of the said mortgaged premises together with an arrear of interest thereon from ——, but this defendant denies that the said mortgaged premises are a scanty security for the same, and on the contrary thereof this defendant saith that the said mortgaged premises are of the value of \$—— and upwards; and this defendant saith that there is no other charge or incumbrance affecting the said mortgaged premises; and this defendant trusts this honorable Court will allow him a reasonable time for the redemption of the said premises; And this defendant denies, &c.

[Add affidavit.]

DISCLAIMERS.

The disclaimer must be on oath as an answer. See pages 70, 71, *ante*.

Form of disclaimer.

The disclaimer of A, to the bill of complaint of B, against him in chancery exhibited.

This defendant says that he does not know or believe that he ever had, nor did he claim or pretend to have, nor doth he now claim or pretend to have any right, title or interest of, in

or to the estates and premises in the said bill set forth or any part thereof; and this defendant doth disclaim all right, title and interest to, or in the said estates and premises, and every part thereof. And prays to be dismissed with costs, &c.

Answer and disclaimer.

These defendants, &c. say they admit that J. C. in the said bill named departed this life on the — day of —, having first duly made his last will and testament, whereby he appointed his sons these defendants joint executors thereof, and that they these defendants proved the same in the — Court of —, on the — day of —, and thereby became his legal personal representatives; And these defendants further severally answering say they do not claim any interest in the estates in the said bill stated to be charged with the annuities to the said complainants W. S. and J. C. therein mentioned and with the mortgage therein also mentioned to be assigned to them; And these defendants further severally answering say they do not object to the payment of what may be due to the said complainants out of the rents and profits of the said estates; And these defendants do disclaim all right title and interest in and to the said estates and every part thereof; And these defendants deny, &c.

REPLICATIONS TO ANSWERS.

See section 181, in preceding volume, and note; also, sections 182—5.

General replication.

See Form in section 181, preceding volume. Rarely reduced to writing in Virginia State Courts, or in the United States Courts held in Virginia.

EXCEPTIONS TO ANSWERS.

See sections 186—193, in preceding volume.

Several exceptions to answer in Chancery.

In the — Court of —.

Between J. R., complainant, and J. F. and C. R., defendants.

Exceptions taken by the said complainant to the insufficient answer of the said defendant C. R. to the said complainant's bill of complaint.

1st.—For that the said defendant C. R. hath not to the best and utmost of his knowledge, remembrance, information and belief, answered and set forth whether at the time when the reversionary interest of the said C. R. in the said bill mentioned was put up for sale as therein mentioned, the Reverend J. F. R. in the said bill named the father of the said complainant, did not and without the knowledge of the said complainant, request T. C. in the said bill named to attend or procure some person to attend the said sale and purchase the reversionary interest for him the said J. F. R., nor whether the said T. C. did not request J. G. in the said bill named to attend such sale and to purchase the reversionary interest of the said C. R. in the estate in the said bill mentioned for the said J. F. R. as therein mentioned, nor whether the said J. G. did not accordingly attend such sale, nor whether he did not become the purchaser of the said reversionary interest for the said J. F. R. at the sum of \$100 or at some other and what sum of money.

2d.—For that the said defendant hath not in manner aforesaid answered and set forth whether in consequence of such purchase the said J. F. R. did not give instructions to his then solicitor for preparing the necessary conveyance of the said reversionary interests in the said estate and premises, and for suffering a recovery and making a complete settlement thereof according to the recommendation of Mr. W. his counsel in the said bill named.

3d.—For that the said defendant hath not in manner aforesaid answered and set forth whether the necessary drafts of such deeds were not accordingly prepared by the said Mr. W. for that purpose, nor whether before such deeds were executed the said J. F. R. did not change his mind respecting the same, and give directions to have fit and proper deeds prepared for conveying the said estate and premises to the said complainant for the said complainant's own benefit, nor whether the same was not so made accordingly.

4th.—For that the said defendant hath not in manner aforesaid answered and set forth whether the said J. F. R. did not himself pay the said sum of \$100 out of his own proper moneys as the purchase-money of the said estate.

5th.—For that the said defendant hath not in manner aforesaid answered and set forth whether under the circumstances in the said bill stated, the said complainant was or can be considered as a purchaser himself of the reversionary

interest aforesaid of the said estate and premises and why, nor whether the said complainant was in fact the purchaser thereof, nor whether he did ever and when advance and pay the purchase-money or any part thereof out of his own proper moneys, nor whether the said J. F. R. was not the actual purchaser thereof in the manner and under the circumstances in the said bill stated, and if not why not.

6th.—For that the said defendant hath not in manner aforesaid answered and set forth whether the reversionary interest in the said estate so purchased by the said J. F. R. was not a free gift from him to the said complainant and for his advancement in life, and if not why not; nor whether the said C. R. did not well know thereof at the time of the execution of the aforesaid conveyance to the said complainant, nor whether he did not fully concur and approve thereof, nor whether all or some and which of the rest of the creditors who had proved debts under the said commission did not also fully concur and approve of the same.

7th.—For that the said defendant hath not in manner aforesaid answered and set forth whether the sale of the reversionary interest aforesaid to the said J. F. R. did not take place in the month of June —, or at some other and what time, nor whether the conveyance to the said complainant did not take place in the month of January —, or at some other and what time.

8th.—For that the said defendant hath not in manner aforesaid answered and set forth whether upon the death of his father the said J. F. R. in the month of March — or at some other and what time the said complainant did not enter into possession of the said estate under and by virtue of the said conveyance, nor whether he hath not ever since been in the undisturbed possession thereof without any claim being made by or on the part of the said C. R., or the validity of the transactions and conveyance in the said bill stated being questioned by him.

9th.—For that the said defendant hath not in manner aforesaid answered and set forth whether under all the circumstances in the said bill stated the said C. R. hath any and what claim upon the said estate and premises, nor whether he is entitled to question the validity of the said complainant's title to the said estate, nor whether the said complainant at any time and when executed any declaration of trust of the

said estate and premises or any part thereof to or in favor of him the said C. R.

In all which particulars the said complainant excepts to the answer of the said defendant C. R. as evasive, imperfect and insufficient, and humbly prays that the said defendant C. R. may be compelled to put in a full and sufficient answer thereto.

G. M., p. q.

PRACTICAL NOTES, &c.

See sections 93, 194 of preceding volume; also pp. 243-50, *ante*; note especially (38) p. 248; (15,) (16,) p. 252; (19,) p. 254; (21,) p. 255; pp. 272, 3; p. 296; p. 310. Affidavits to answers, disclaimers, &c., may be to the like effect with that pointed out on p. 317 as proper in case of a bill of injunction, &c.

A party claiming relief in equity, as a bona fide purchaser must positively and precisely deny all notice though it be not charged. 1 John Ch. Rep. 302, *Ibid.* 566; 2 John Ch. Rep. 155- *Ibid.* 158; 3 John Ch. Rep. 345. When a defendant answers that he has not any knowledge or information of a fact charged in the plaintiff's bill, he is not bound to declare his belief one way or the other. *Morris, &c. v. Parker*, 3 John Ch. Rep. 297. It is only when he states a fact upon information or hearsay that he is required to state his belief. *Ibid.* See also 5 John Ch. Rep. 247.

When a plea is ordered to stand for an answer, it may be considered as a defence in whole or in part, but not as a full defence. 6 John Ch. Rep. 254; in such case, the plaintiff cannot except to the plea as an answer, without special leave given for that purpose. *Ibid.* See 1 Brown's Ch. Rep. p. 404. 4 Brown's Ch. Rep. 439; also 3 Ves. 222.

See *Hughes v. Blake*, 9 Wheat. 453, cited *ante*. p. 305, 311, and *Heartt v. Coming*, 3 Parage 569. In the latter of these cases, Ch. Walworth said that when it is unnecessary to support the plea by an answer, the plea is not considered as evidence in behalf of the defendant as to any facts stated therein, and does not require the testimony of more than one witness to contradict it, even where it negatives a material averment in the bill. See 2 Rob. Pr. 331.

A plaintiff cannot read his own answer to a bill of discovery in a cross suit in evidence unless the defendant chooses first to introduce it. 1 John Ch. Rep. 131.

As to pleas to the jurisdiction, see Code of Virginia, chap. 171, sec. 19; also sec. 37.

As to when pleas in equity should be on oath, Lord Redesdale, on the authority of the Practical Register, says: "pleas to the jurisdiction of the court, or in disability of the person of the plaintiff, as well as pleas in bar of any matter of record, or of matters recorded, or as of record in the court itself, or any other court, may be put in without oath." (See above cited sec. 37, chap. 171, Code of Virginia, requiring oath to pleas in abatement.) Daniell thinks the doctrine too broadly stated by his Lordship and suggests the following general rule: "The best mode to be adopted by the practitioner for determining the question will be to consider how far the oath will be necessary in the event of the plea being considered valid, and issue being joined upon it, to establish its truth by evidence upon oath at the hearing; and in all cases where such evidence upon oath would be required at the hearing, to let the plea be accompanied by the oath of the defendant." 2 Dan. Ch. Pr. 211. In U. S. C. C. all pleas should be put in under oath. See sec. 171 *ante*.

VI.

Proceedings at rules in the United States Circuit Courts and in the Virginia State Courts.

RULES IN THE UNITED STATES CIRCUIT COURTS.

The rules are held in these courts in an Order Book required by the fourth rule of the United States Supreme Court to be kept by the clerks of the several circuit courts of the United States. On reference to the Rules of Practice, p. 219 *ante*, the reader will learn the mode of holding rules in these courts and the character of the entries to be made therein.

RULES IN THE VIRGINIA STATE COURTS.

The following are the orders entered at rules in these courts as extended, when the record in suits in equity is made up. These orders are entered in brief on the rule book by the clerk, as will be seen on reference to the "Form of clerk's rule book" hereafter given.

As was stated in preceding volume, sec. 6, the rules for these courts are opened in the clerk's office on the *first* Monday in every month, except when a term of a circuit court or a quarterly term of a county or corporation court commences on that day, or either of the two following days, or on the preceding Thursday, Friday and Saturday, in either of which events, the rules will be held on the *last* Monday in the next preceding month. The rules continue open three days. (a)

(a) It was stated in sec. 1, preceding volume, that suits ordinarily may be instituted in the Virginia State courts before filing a bill or information, by filing a memorandum with the clerk, and the form of a memorandum is given in that section. The following are forms of other memoranda to institute a suit in these courts:

MEMORANDA.

Memorandum for summons in suit instituted by a next friend of infant or married woman.

A. B., an infant [of tender years, by G. H., his next friend, plaintiff; against R. B. and K. L., defendants.

Issue summons, &c., (as in sec. 1 of preceding volume.)

G. M., p. q.

Forms of orders at rules in Virginia State Courts.

[In the following forms, the sections marked as the heading of each entry refer to sections in the preceding volume.]

Rule on plaintiff to file his bill. (Sec. 8 and 67.)

This day the defendant C. D. appeared to the suit against him by A. B., plaintiff, and gave a rule to the plaintiff to file his bill on or before next rules to be held in this office.

Suit dismissed for want of bill after rule. (Sec. 9 and 67.)

In this suit, the defendant C. D. gave a rule to the plaintiff at the ——— rules to file his bill, and the said plaintiff having failed to file the same, it is ordered that this suit stand dismissed and that the plaintiff pay unto the said defendant five dollars and his costs by him about his defence in this behalf expended.

Same, when three months have expired since summons was executed on the defendant and bill not filed. (Sec. 9 and 67.)

Three months having expired since the summons issued in this suit was executed on the defendant, C. D., and the plaintiff having failed to file his bill herein, it is ordered that this suit be dismissed.

Suit abated for want of jurisdiction. (Sec. 10.)

The defendant, C. D., having been returned by the sheriff of ——— on the summons heretofore issued against him, as not a

Julia B., the wife of R. B., by J. M., her next friend, plaintiff, against K. L. and the said R. B., defendants.

Issue summons, &c., (as in sec. 1. of preceding volume.)

G. M., p. q.

When there are infant or insane defendants.

L. B., plaintiff, against G. M., R. P., (a person of unsound mind,) and Q. O., the last named of whom is an infant under the age of twenty-one years, defendants.

Issue summons, &c., (as in sec. 1. of preceding volume.)

G. W. R., p. q.

By the committee of lunatic, &c.

I. B., committee of the person and estate of E. F., a lunatic. (or, committee of the estate of B. M., a convict,) plaintiff, against R. M., C. D. and J. S., and B. W., the committee of the person and estate of L. W., a lunatic, defendants.

Issue summons, &c., (as in sec. 1. of preceding volume.)

resident of this county, and it appearing on the face of the bill of plaintiff, that this court has not jurisdiction as to said defendant, it is ordered that this suit abate.

Decree nisi. (Sec. 68.)

The summons awarded in this cause being returned executed on the defendant C. D., and the bill of the plaintiff having been filed, and the said C. D. still failing to appear and plead, answer or demur to the said bill, on the motion of the plaintiff it is ordered that it be entered on record that his bill will be taken for confessed as to the said C. D., if the said C. D. shall continue in default.

Rule to plead given defendant by plaintiff. (Sec. 68.)

The summons awarded in this cause being returned executed on the defendant, C. D., and the bill of the plaintiff having been filed, and the said defendant C. D. having appeared, but yet fails to plead, answer or demur to the said bill, a rule is given to the said defendant to plead, answer or demur to the said bill by the rules next succeeding this rules; and if the said C. D. shall then fail to plead, answer or demur to the said bill the same will be taken for confessed as to him.

Bill taken for confessed and cause set for hearing. (Sec. 69.)

The defendant C. D. not yet having appeared and pleaded, answered or demurred to the plaintiff's bill, the same is taken for confessed as to the said defendant, and the cause is set for hearing as to him. (a)

Or, the defendant C. D., who has appeared to this suit, still failing to plead, answer or demur to the plaintiff's bill, the same is taken for confessed as to the said defendant, and the cause set for hearing as to him. (a.)

Plea or demurrer set down for argument. (Sec. 71.)

This day came the defendant C. D., and filed a plea (or demurrer) to the plaintiff's bill, and the said plea (or demurrer) is set down for argument.

Issue taken on plea. (Sec. 71.)

This day came the defendant C. D., and filed a plea to the plaintiff's bill, and the plaintiff took issue upon the statements

(a) See Sec 69. In case of taking bill for confessed, the cause may be set for hearing at the same or at the succeeding rules.

made in the said plea, and it is ordered that the said issue be tried by a jury. (a.)

Replication to answer and cause set for hearing. (Sec. 73.)

This day the defendant C. D. appeared and filed his answer to the bill of the plaintiff, and the plaintiff thereupon replied generally, and the cause is set for hearing as to the said defendant.

Exceptions to answer. (Sec. 73.)

The plaintiff this day filed exceptions to the defendant's answer, and the said exceptions are set down for argument.

Suit set for hearing by defendant. (Sec. 76.)

Four months having elapsed since the answer of C. D., a defendant in this cause was filed, and the plaintiff herein not having set the cause for hearing as to such defendant, and not having filed exceptions to his said answer, on motion of the said defendant, this cause is set for hearing as to him.

Guardian ad litem assigned infant or insane defendant to defend him. (Sec. 77.)

C. G. is assigned *guardian ad litem* to the infant (or insane) defendant, G. D. to defend his interests in this suit.

Order of publication against absent defendants. (Sec. 78.) (b)

R. M., plaintiff, against L. C., D. R. and others, defendants.

The object of this suit is to (here state object of suit;) and affidavit having been made and filed that the defendants above named are non-residents of this Commonwealth, the said defendants are notified to appear at the rules to be holden in the clerk's office of the said court on the first Monday in — next, and do what is necessary to protect their interests in this suit.

Same, against unknown defendants. (Sec. 78.) (b)

R. M., plaintiff, against L. C., R. K., and certain defendants, unknown, (heirs at law and distributees of K. M., deceased, or as the case may be,) defendants.

(a) Should this order be made by the clerk in the office, or only by the court in term time? We see no reason why the entry may not be as properly made by the clerk, and this seems to have been the intention of the Code. (See Code of Virginia, chap. 171, sec. 33.)

(b) This order should be published successively for four successive weeks, in some newspaper, and a copy posted up as mentioned in sec. 80, *ante*. A like order may be made against other defendants,—see sec. 78. In no case should the order be entered without affidavit as required by statute. See Code of Virginia, chap. 170, sec. 10.

The object of this suit is to (here state object of suit,) and the bill stating that the names of the persons interested in the subject of this suit described in the bill as parties unknown, (heirs at law &c., or, as the case may be) and affidavit having been made and filed that the names of the said persons are unknown to the plaintiff, the said defendants are notified to appear at the Rules to be holden in the clerk's office of the said court on the first Monday in _____ next, and do what is necessary to protect their interests in this suit.

Scirefacias awarded. (Sec. 88—91.)

On motion of the plaintiff a writ of scirefacias is [awarded against C. D., executor of the last will and testament [or administrator of all and singular the goods and chattels] of R. M., deceased, returnable to the rules to be held on the first Monday in _____ next, (b) (or, against C. D., executor, &c.,) (or administrator, &c.,) also against L. B. and _____

As to process of contempt.

(See next title.)

[Here follows the form of a Clerk's Rule Docket for Equity causes in Virginia State Courts:]

(a) May be made returnable to a term.

nia State Courts.

In this: den for confessed,) and G. R., *general replication.*

*Plaintiff's
Counsel.*

AUGUST.	SEPT'R.	OCTOBER.	NOVEM'R.	DECEMB'R
<p>cause et for bringas them, having dscifa. t B. R. k'or of is last ill and tament d N. O. d P. Q. is devi- tees to pt. R's.</p>	<p>ex'd on B. R. N. O. P. & Q.—and X. having married A. B. sci- refacias v. A. B. and X. his wife to Oct. Rules.</p>	<p>ex'd on A. B. and X. his wife, and suit revived ag't them.</p>	<p>convict (or luna- tic) scifa. vs. C. D. his com- mittee to Dec. R's.</p>	<p>D. com- mittee of Y. retur'd ex'd and suit revi- ved ag't him.</p>
<p>Three Months having elapsed nce ser- vice of summ's on T. U. and bill not filed, suit dis- missed.</p>				

¹ *Quære:* ess of contempt be issued at rules?
It seems prior to such action, there seems to be no reason
why they m
² In the E
If defendg other creditors, to the injury of plaintiff, a writ
f sequestra



VII.

Mesne process in the United States circuit courts and in the Virginia State courts.

IN THE UNITED STATES COURTS.

Subpœna.

THE PRESIDENT OF THE UNITED STATES OF AMERICA,

To the Marshal of the Eastern District of Virginia, Greeting:

You are hereby commanded to summon A. B., N. R., B. W. and J. N. (a) citizens of the State of Virginia, and residents within the Eastern District thereof, to appear before the Judges of the court of the United States, for the fourth circuit and Eastern District of Virginia, at the city of Richmond, on the — day of — term of said court (or, at the rules to be held in the clerk's office of the said court on the first Monday in — next) to answer a bill in equity exhibited against them in the said court by B. M. and D. W., citizens of the State of Massachusetts: And this they shall in no wise omit, under the penalty of one hundred dollars each; and have then there this writ.

WITNESS, R. B. T., chief justice of the supreme court of the United States, (b) at Richmond, in the Eastern District of Virginia, this — day of — 18—, and in the — year of the Independence of the United States of America.

P. M., clerk.

Scirefacias.

THE PRESIDENT OF THE UNITED STATES OF AMERICA,

To the Marshal of the Eastern Virginia District, Greeting:

Whereas a suit in equity was lately depending in the court of the United States, for the fourth circuit, and Eastern District of Virginia, between B. M. and D. W., *plaintiffs*, and A. B., N. R. and B. W., *defendants*; but before any proceedings were (or, final decree

(a) A rule prevailed in the English courts that the names of not more than three defendants should be inserted in one *subpœna*; no such rule exists either in the United States circuit courts or in the Virginia State courts.

(b) In case the chief justice be not living, all writs issuing from these courts must run in the name of the oldest associate justice of the supreme court of the United States.

was) entered therein, the said N. R. departed this life, leaving a last will and testament, which has, as we have been informed, been duly admitted to probat in the court of — for the city of —, and G. M., who was by said will appointed executor thereof, has duly qualified as such, and the said plaintiffs have applied for a proper remedy in this behalf, and being willing that right and justice may be done, agreeable to the Acts of Congress of the United States in such case made and provided, we command you, that you make known according to law, to the said G. M., executor of the last will and testament of N. R., deceased, that he be before the judges of the court of the United States, for the fourth circuit and Eastern District of Virginia, in the City of Richmond, on the — day of — next, to shew if any thing for himself, he hath or can say why the said suit in equity aforementioned, and the proceedings therein had, should not stand and be revived against the said G. M., executor of the last will and testament of said N. R., deceased, and be in all things in the same plight and condition as it was at the time of the decease of the said N. R.: and further to do and receive what the said court shall in that part consider. And have then there this writ.

WITNESS, R. B. T., chief justice of the United States supreme court, (a) at Richmond, this — day of —, and in the — year of the independence of the United States of America.

P. M., Clerk.

NOTE.—This form may be readily adapted to any case in which a scire-facias issues.

IN VIRGINIA STATE COURTS.

Summons. (b)

See form of summons in sec. 2 preceding volume. (c.)

Summons with order of injunction.

Copy form of summons in sec. 2 preceding volume:—then endorse:

When injunction to a judgment. To injoin and restrain the within named defendants, A. B. and C. D., from further proceeding in an action at law instituted by them in the — court of the

(a) See note (b) to preceding form of subpoena.

(b) The writ formerly used was a subpoena, the terms of which were similar to that of the subpoena now issued from United States circuit courts. See p. —, ante.

(c) A rule prevailed in the English courts that the names of not more than three defendants should be inserted in one subpoena. No such rule exists in the Virginia State courts or in the United States courts.

county of —, against the within named R. B. But before this injunction is to be effectual, the said R. B. shall enter into bond with sufficient security, in the clerk's office of the said court, conditioned as the law directs, and shall further execute a release of all errors at law.

P. R., Clerk."

If the injunction has been awarded in vacation and not by the court in term time, it is usual for the clerk in his endorsement to state what judge awarded it, thus:

"By order of the honorable J. B. C., judge of the circuit court for the — circuit of Virginia.

P. R., Clerk."

When injunction for waste, &c. The endorsement should follow terms of order awarding injunction.

Summons with attachment.

(Sess. Acts of Virginia 1852, p. 78.)

Copy form of summons in section 2, preceding volume: then endorse:

"The plaintiff in this suit having made the proper affidavit, it is ordered that the officer serving the within writ do attach *the specific property mentioned in said affidavit, to wit: (here describe specific property as described in the affidavit) and (a) such debts as are already due, or to become due, to the defendant C. D., (who is a non-resident of the Commonwealth of Virginia,) from the other defendants, L. M. and R. S., or either of them; also any other estate of the said defendant, C. D., whether in his own hands or in the hands of the other defendants, L. M. and R. S. to answer the future order of this court.*

Teste:

J. E., Clerk."

Bail in equity in Virginia.

See Session Acts 1851-2, p. 36; also Session Acts 1852, p. 77. For mode of procedure, see Tate's American Form Book, edit. 1854, pp. 150, 156.

SCIREFACIAS.

To revive against a personal representative, as follows:

THE COMMONWEALTH OF VIRGINIA, to the — of — county, greeting:

Whereas, in a certain suit in equity, lately depending in the — court of — between J. B. and N. C., plaintiffs, and R. W. and N. B., defendants, before any further proceedings were had there-

(a) If suit be not for specific property, omit the words italicised.

in, (or, before a final decree therein,) the said N. B. departed this life intestate, and due administration of all and singular his goods and chattels having, as we have been informed, been granted to R. X. by the — court of — county, and the said J. B. and N. C. having applied for a proper remedy in this behalf, and being willing that right and justice may be done, agreeably to the statutes of Virginia in such case made and provided, we command you that you make known, according to law, to the said R. X., administrator of all and singular, the goods and chattels of the said N. B., deceased, that he be before our said court of —, in the — of —, on the — day of — next, to show if anything for himself he hath or can say why the said suit and the proceedings therein had, should not stand and be revived against the said R. X., administrator as aforesaid, and be in all things in the same plight and condition as it was at the time of the decease of the said N. B., and further to do and receive what our said court shall, in that part, consider. And have then there this writ.

WITNESS, P. R., clerk of our said court, at Richmond city, this — day of — and in the — year of the independence of the United States of America.

P. R., Clerk.

Scirefacias against real and personal representatives, &c., (Sec. 88)

THE COMMONWEALTH OF VIRGINIA, to the sheriff of — county, greeting:

Whereas, in a certain suit in equity, lately depending in the — court of — between J. B. and N. C., plaintiffs, and R. B. and N. B., defendants, before a final decree was had therein, R. B., one of the defendants, departed this life, leaving, as we have been informed, the following children and sole heirs at law, to wit: John, Sally and Bettie B., all of whom are over the age of twenty-one years; and, as we have been further informed, due administration of all and singular the goods and chattels of the said R. B. has been granted by the — court of — county to M. N., and the said J. B. and N. C. having applied for a proper remedy in this behalf, and being willing that right and justice may be done, agreeably to the statutes of Virginia in such case made and provided, we command you that you make known, according to law, to the said John, Sallie and Bettie B., aforementioned children and heirs at law of said R. B., deceased, and to the said M. N., administrator of the goods and chattels of the said R. B., deceased, that they be before our said — court of — on the day of — next, to show if any thing for themselves they have or can say why the said suit and the proceedings therein had should not stand and be revived against them, and be in all things in the same plight and condition as it was at the time of the decease of the said R. B., and further to do and receive what our

said court shall in that part consider. And have then there this writ.

WITNESS, J. H., clerk of our said court at — this — day of — 18 —, and in the — year of the Independence of the United States of America.

J. H., Clerk.

PROCESS OF CONTEMPT TO COMPEL ANSWER.

PROCESS OF CONTEMPT.

[As stated in preceding volume this process, originally in England, when directed against a person, consisted of five steps:

1st. A writ of attachment directed to the sheriff of defendant's county.

2nd. A writ of attachment with proclamations also directed to the sheriff of defendant's county.

3rd. A writ of rebellion directed to commissioners appointed by the court and extending into all the counties of England.

4th. An order that the sergeant at arms, as the immediate officer of the court, should effect the arrest.

5th. A writ of sequestration, issuable only on the return of *non est inventus* by the sergeant at arms, or on a defendant in custody.

In *Hook v. Ross*, 1 H. and M., 310, determined in 1807, these five steps were expressly recognized as then existent and in force in Virginia, (a) and under the statutes of the state at that time. The following were the forms of these several processes.

(a) Judge Tucker said: "That Hook was in contempt for not obeying the order of October, 1806, I think unquestionable from the particulars noticed in the commissioner's report. I therefore hold the order for the attachment for such contempt to have been perfectly regular, that being the first process of contempt, (2 Sol. Guide, 511) and generally obtained, of course, on affidavit, (Ibid. 512,) and the sheriff is the proper officer to execute it, (Ibid. 515.) And if he returns a *non est inventus* thereon an attachment with proclamation issues (Gilb, ch. 35.) Upon this process two returns may be made; either a *non est inventus* upon which an attachment with proclamations, issues of course, or a *cepi corpus*; if he returns the latter the next step is a *habeas corpus* to bring up the body, for the sheriff cannot carry him out of his county, (Gilb, ch. 70.) And if, upon an attachment for not performing a decree, the sheriff returns *cepi corpus* and lets the party to bail, (which he should *not do* where the writ is marked for the execution of a decree) there a sequestration is granted immediately, (Ibid. 191.) So, if be brought up by *habeas corpus*, and will not perform the decree, but obstinately lies in prison, (Ibid. 191, 192, *Ross v. Colville*, 3 Call, 382.) If, upon attachment with proclamation, the sheriff *non est inventus* be returned the sergeant at arms, who is the immediate officer of the court, is sent to seek him, (Gilb, ch. 35.) And this officer our law expressly authorizes the court to appoint, L. vi, 794, c. 64, s. 10. And he may execute the order of the court in any part of the state where the party may be found which the sheriff could not; and he might also, as I conceive, bring up the body of the party in contempt without committing him to the jail of the county, and waiting for a *habeas corpus* as the sheriff must. After all this process if a *non est inventus* be returned, a writ of sequestration issues, (Gilb, ch. 35-36.)

1. *Attachment.*

THE COMMONWEALTH OF VIRGINIA, to the sheriff of — county,
greeting :

We command you that you attach A. B. so that you have his body before our judge of the circuit court of — to answer as well of a certain contempt by him to us offered, as it is said, as to those things which to him shall be then and there objected ; and further to do and receive what our said court shall in that part consider. And this you shall in no wise omit. And have then there this writ.

WITNESS, J. E., clerk of our said court at the county of —, this — day of — and in the — year of the commonwealth of Virginia.

J. E., Clerk.

Endorse.—For not appearing to answer (or for not answering) the bill of complaint exhibited against him by C. D.

2. *Attachment with proclamations.*

THE COMMONWEALTH OF VIRGINIA, to the sheriff of — county,
greeting :

We command you that in all and singular places in your bailiwick where to you shall seem most expedient, you cause it publicly on our part to be proclaimed that H. O., under the penalty of his allegiance, before our judge of the circuit court of — in chancery, at the court house, on the first Monday in next month, personally do appear, and nevertheless the said H. O., in the meantime, if you can find, you attach so that you have his body before our judge of our said court at the day aforesaid to answer us as well of a certain contempt by him to us offered as it is said, as upon those things which to him shall then and there be objected ; and further to do and receive what our said court shall in that part consider. And this you shall in no wise omit. And have then and there this writ.

WITNESS, J. E., clerk of our said court at the county of — this — day of — and in the — year of the commonwealth of Virginia.

J. E., Clerk.

Endorse.—For not appearing to answer, (or for not answering,) the bill of complaint exhibited against him by C. D.

All this is analagous to the process to compel an appearance as detailed and explained, Gilb. ch. 18-77.) And when once a defendant is in contempt he must clear it before he can be heard, (Ibid. 34-216.)

3. *Writ of rebellion.*

THE COMMONWEALTH OF VIRGINIA, to the sheriff of — county greeting :

Whereas by public proclamation made in our behalf by the sheriff of — in divers places in that county, by virtue of our writ to him directed, C. P. hath been commanded, upon his allegiance, to appear before us in our circuit court of — county, at a certain day now past; yet he hath manifestly contemned our command, therefore we command you to attach or cause the said C. P. to be attached, wheresoever he shall be found within our said commonwealth as a rebel and contemner of our said laws, so as you have him or cause him to be before us in our said circuit court on the first day of the next term to answer to us as well touching the said contempt as also such matters as shall be then and there objected against him, and further to perform and abide such order as our said court shall make in this behalf and hereof fail not. We hereby also strictly command all and singular, mayors, sheriffs, bailiffs, constables and other our officers and the good citizens of this commonwealth that they by all proper means diligently aid and assist you in all things in the execution of the premises. And have then and there this writ.

WITNESS, J. E., clerk of our said court at the county of —, this — day of — and in the — year of the commonwealth of Virginia.

J. E., Clerk.

Endorsed.—For not appearing to answer (or for not answering) the bill of complaint exhibited against him by C. D.

4. *Order for Sergeant at Arms.*

A. B. PLAINTIFF v. C. D. DEFENDANT.

Whereas the said defendant hath sat out all process of contempt to a commission of rebellion for want of his answer to the plaintiff's bill, and it appearing by the certificate on the commission of rebellion heretofore awarded that the said defendant doth abscond himself so that he cannot be taken thereupon, it is therefore ordered upon the motion of —, the plaintiff's counsel, that *the Sergeant at Arms, attending this court,** do apprehend the said defendant and bring him to the bar of the said court to answer the said contempt.

* If the suggestion subsequently made (p. 417.) be adopted, here, instead of words italicised, say, "the sheriff of — county, who is the officer in attendance in this court, and authorized and required by the statutes of Virginia to execute its process, and who is hereby appointed a Sergeant at Arms for the purpose."

5. *Writ of Sequestration.*

THE COMMONWEALTH OF VIRGINIA, to the sheriff of — county,
greeting:

Whereas in a suit now pending in our Circuit Court for the county of — between W. F., plaintiff, and J. F., defendant, process of contempt has been issued against the said J. F. for his contempt in refusing to file an answer to the bill in equity exhibited against him in the said court by the said W. F. Know ye, therefore, that we in confidence of your prudence and fidelity, have given, and by these presents do give to you or any two or more of you full authority and power to enter into all messuages, lands, tenements and real estate of the said J. F. whatsoever, within the district of our said Circuit Court, and to take, select, receive and sequester into your hands not only all the rents and profits of his said messuages, lands, tenements and real estate, but also all his goods, chattels and personal estate whatsoever within the district aforesaid, and therefore we command you, or any two or more of you, that you do at certain proper and convenient days and hours go to and enter upon all the messuages, lands, tenements and real estate of the said J. F., and that you do collect, take and get into your hands not only all the rents and profits of his said real estate, but also all his goods, chattels and personal estate, and detain and keep the same in sequestration in your hands until the said J. F. shall answer the said bill and do what our said court shall direct. And how you shall have executed this precept make known to the judge of our said court on the — day of the next term. And have then and there this writ.

WITNESS, J. E., clerk of the said Circuit Court in the county of — this — day of — and in the — year of the Commonwealth of Virginia.

J. E., Clerk.

There is no provision in our statutes expressly or even by implication revoking, repealing or altering any of the steps in this process as it was used at the time of the decision in *Hook v. Ross*. The 'process of contempt' is recognised as in existence in Virginia by the latest enactments affecting the subjects of this process, (see Code of Virginia, chap. 172, sec. 47;) yet a question presents itself in connection with the fourth of these steps, which, in the present state of our statutes, is somewhat difficult of solution, and may lead to an abandonment of this process altogether, unless the aid of the legislature be obtained to relieve the subject of this difficulty. Our law does not now recognize the existence of such an officer as the 'Sergeant at Arms' of the Court of Chancery. That office was abolished by the act found in 1 R. C., 1819, which authorised the 'Marshal'

to execute all the duties assigned theretofore to a Sergeant at Arms. In turn, the office of Marshal of the Courts of Chancery was abolished by the act passed April 16, 1831, (Supp. Rev. Co., chap. 107, sec. 70,) and, in the main, by that act, all the duties theretofore discharged by the marshals were confided to the sheriffs of the counties and the sergeants of the corporations. In the main, we say, for we do not find that all the powers which the marshal exercised were given to the sheriffs or the sergeants. On the contrary, one essential ingredient for the due execution of the fourth step in the process of contempt these officers lacked, and that is—the power to execute process in any county within the limits of the State. (a) That this is essential—that the writ of sequestration should not issue until a return of *non est inventus* by an officer whose powers (at least *quoad* the process of a Sergeant at Arms) were co-extensive with the limits of the State, is, we think, certain, and this conclusion is based both upon the positive *dictum* of judge Tucker in *Hook v. Ross* and the manifest hardship which an opposite opinion would operate on parties whose property might be sequestered without such a return. If this be true, what course should be taken to avoid the difficulty? Will the courts of Virginia specially appoint such an officer as that contemplated, and, indeed, required, for the due execution of this process; or will they abandon their right to enforce in this form obedience to their mandates? One or the other of these courses they must adopt, and, in the absence of positive legislation on the subject, it would, perhaps, be better to pursue the former, (liable as it may be to the charge of usurping powers not properly appertaining to the courts,) than to adopt one which would strip them to no little extent of the authority to compel obedience to their decrees. If this suggestion were acted on, then the difficulty might be removed by the appointment of the sheriff as a special officer of the court to execute the fourth step in this process, authorizing him as a special Sergeant at Arms, messenger, or by any other name, to serve the process in any county of the State. The return of *non est inventus* by such an officer, if the regularity of his appointment were not successfully attacked, would be a sufficient foundation on which to base the issue of a writ of sequestration. The subject, in the present state of our laws, to say the least, presents, in any point of view, an embarrassing question, and it would be well if the legislature passed an act authorizing our present sheriffs or sergeants to perform all the duties in connection with the process of contempt formerly discharged by a Sergeant at Arms. This would relieve the Virginia courts of every difficulty, and it seems to be demanded

(a) It has never been contended, so far as the writer has been able to discover, that sheriffs or constables had the power to execute this process without the limits of their respective counties or corporations.

in order that these courts may compel a due and faithful compliance with their decrees as well as require contumacious defendants to appear and answer bills in equity which may be exhibited against them.

Process of contempt against a Corporation.

See preceding volume, section 86, and note 27 subjoined to that section.

The foregoing forms of process of contempt with the comments thereupon, are intended to apply to the practice in the Virginia State Courts. In the United States Circuit Courts, the process subsequent to the issuing of a subpoena (as against a person) is prescribed by the 7th rule of United States Supreme Court found on p. 221 *ante*. See also 18th rule of United States Supreme Court, p. 223 *ante*. In the case of a corporation, a distringas should issue after the subpoena. The forms hereinbefore contained may be readily adapted to the practice in the United States Circuit Courts.

VIII.

Depositions in the United States Circuit Courts and in the Virginia State Courts.

IN THE UNITED STATES CIRCUIT COURTS.

See Book 1, chap. vi. of preceding volume, especially sec. 208, 217, 224, 231, 232.

The following officers may take depositions to be used in these courts:

1. Any justice or judge of any of the courts of the United States. (a)

2. The Chancellors, the Judges or Justices of the Supreme or Superior Courts and the Judges of the County Courts or Courts of Common Pleas of the several States. (a)

3. The Mayors or other chief Magistrates of cities in the several States. (a)

4. Commissioners appointed by the Courts of the United States to take affidavits and acknowledgments of bail. (b)

5. Notaries Public in the several States and Territories of the Union. (c)

The usual course adopted in taking testimony in these courts is the one prescribed by the 67th rule of United States Supreme Court, mentioned in sec. 208 of preceding volume. After the cause is at issue commissions are obtained from the clerk by both parties jointly or severally by either upon interrogatories filed in the clerk's office, and ten days notice thereof given to the adverse party to file cross interrogatories before the issue of the commission.

The framing of interrogatories will of course depend upon the facts in such case. The 71st rule of the Supreme Court of the United States, however, prescribes the form of concluding interrogatories which should be as follows: (see page 236, Ante.)

(a) Acts of Congress, 1789, chap. 30, sec. 30. 1 Story's Laws U. S., p. 64. See LXVIII Rule Supreme Court U. S., ante p. 235.

(b) Acts of Congress 1812, chap. 25, sec. 1. 2 Story's Laws U. S. p. 1214.

(c) Acts of Congress 1853-4, p. 315.

Upon taking out a separate commission the notice to the adverse party as before-mentioned, is as follows:

No. 1. Notice.

To A. B. AND C. D., Take notice that in the suit depending in the Circuit Court of the United States for the — of —, wherein I am plaintiff and you are defendants, I have, agreeably to the 67th rule of the Supreme Court of the United States, prescribed for the use of the Circuit Courts of the United States, filed interrogatories to be propounded to — witnesses in my behalf, and that on the — day of — I shall apply for a commission to take the depositions of said witnesses as the rule prescribes, and meanwhile you are at liberty to appear in the clerk's office of the court and file cross interrogatories to be propounded to the said witnesses.

Yours, respectfully,

J. K.

If cross interrogatories be filed, the clerk should enclose with the commission both the interrogatories in chief and cross interrogatories to be propounded to witness. If no interrogatories be filed, the commission will issue *ex parte*. The following is the form of the commission in either case:

No. 2. Commission.

THE PRESIDENT OF THE UNITED STATES OF AMERICA, TO —,
Greeting: (a)

Know ye that in confidence of your prudence and fidelity, and by these presents, you [or any two or more of you] are invested with full power and authority to examine — on his corporal oath as a witness in a suit depending in the Circuit Court of the United States for the —, wherein J. K. is plaintiff and A. B. and C. D. are defendants, on the part of the — upon the interrogatories annexed to this commission; and therefore you are hereby commanded that you [or any two or more of you] at certain days and places to be appointed by you for that purpose, do cause the said — to come before you, and then and there examine them on oath [upon the said interrogatories] and that you take such examination and reduce the same into writing and return the same annexed to this writ, certified, under your seal, [or under the seals of two or more of you] unto the said Circuit Court before the judges thereof with all convenient speed.

WITNESS, R. B. T., Chief Justice of the Supreme Court of the

(a) See section 208, preceding volume, as to naming of commissioners.

United States in the said court this — day of — in the year of our Lord — and of our independence the —.

P. M., Clerk.

In pursuance of this commission the depositions will be taken and returned to the clerk, certified and sealed as its terms direct. (See form of depositions, No. 7 *post*.)

Sometimes, as stated in section 209 of preceding volume, parties to suits in equity in the United States Circuit Courts, agree that the testimony may be taken upon oral interrogatories by the parties or their agents. Of course the commission is issued in such cases as in others. In the form of the commission, however, the words in preceding form having reference to written interrogatories should be omitted.

Testimony in the United States Courts may, in the discretion of the courts, upon the request of either party, be ordered to be taken by depositions and in conformity with the regulations prescribed by law for the courts of the highest original jurisdiction in equity, in cases of a similar nature in that State in which the Court of the United States may be holden. (See section 213 of preceding volume.) And by the Act of February 20th, 1812, sec. 3, it was enacted that in any cause before a Court of the United States it should be lawful for such courts in its discretion to admit in evidence any deposition taken in *perpetuam rei memoriam* which would be so admissible in a court of the State wherein such cause is pending according to the laws thereof.

De bene esse.—Depositions may be also taken *de bene esse* in these courts before the parties are at issue under the 70th rule of the U. S. Supreme Court, page 236, *ante*. To comply with the requirements of this rule the following steps are necessary:

1st. An affidavit that the plaintiff's witnesses are aged, or infirm, or going out of the country, or that the witness he wishes to examine is a *single* witness to a material fact.

2nd. That a commission issue by the clerk directed to such commissioner or commissioners as the judge of the court may direct.

3d. A notice to adverse party of time and place of taking deposition of witness or witnesses.

4th. The deposition.

No. 3. (1) *Affidavit*.

CORPORATION OR COUNTY OF —.

A. B. this day appeared before me, &c., (*here describe character of officer administering oath*.) in said corporation or county, and made oath that B. W. and C. H., witnesses in his behalf in a certain suit pending in — Court of — wherein X. Y. and Z. are defendants, are aged and infirm (or going out of this country,)

(or that the said B. W. is a single witness on his behalf to a material fact in support of his claim preferred in said suit, and that C. H. so aged or infirm, &c.)

Given under my hand this — day of —.

(Signature.)

No. 4. (2) Commission.

[The form of commission issued in this case will be identical with that in other cases, with these exceptions; the names of the commissioner or commissioners should be inserted in it, and it should specify that the examination of the witness or witnesses will be taken *de bene esse*.]

(3) Notice.

The notice found on page 420 *ante* may be readily adapted to this case.

No. 5. (4) Deposition.

Be it remembered that on the — day of — at — in pursuance of the commission hereto annexed, we A. B. and N. H., the commissioners therein appointed, proceeded to execute the said commission by taking the examination of B. W. and P. H., to be read in evidence *de bene esse* in a suit, &c. (Here recite style of suit and court in which it is pending.)

The said B. W. being by us carefully examined, and cautioned, and duly sworn (or affirmed) to testify the truth, the whole truth and nothing but the truth saith, &c. (Here state clearly every pertinent declaration of the witness and his reply to questions put by or at the instance of either party or by counsel, and at the close of examination let the witness sign it.)

The said C. H. being carefully sworn, &c., (as before in the examination of B. W.)

We further certify that the preceding depositions were reduced to writing by one of us (or by the said witnesses in our presence) and signed by the said B. W. and C. H., and that we are not of counsel or attorney for either of the parties in the said suit, nor are we interested in the event thereof.

A. B. }
N. H. } Commissioners.

NOTE.—Transmit depositions by mail or otherwise, enclosing commission. See sec. 211 preceding volume.

No. 6. Deposition *de bene esse* under acts of Congress.

Be it remembered that on the — day of —, at — A. B. personally appeared before me J. S. a commissioner appointed under the laws of the United States, to take affidavits and ac-

knowledgments of bail, (or, as the case may be) *and made oath*, (or, if the application is made by another in behalf of the party on an affidavit made by such party, before a judge of the United States or commissioner elsewhere, then say, *application was made to me J. S. &c. upon the affidavit of A. B. stating,*) that he the said A. B. was plaintiff in a suit then depending in the Circuit Court of the United States, for the ——— Circuit and ——— District of ——— wherein C. D. was defendant, that the testimony of E. F. of ——— mariner, was material and necessary for him the said defendant in the prosecution of such suit, and that he the said E. F., lived at ——— more than one hundred miles from ———, where the court, at which he the said defendant expected the said cause would be tried, was appointed by law to be held, (or otherwise as the case may be, according to the affidavit): that C. D., the above named defendant, resided at ——— about ——— miles from ——— aforesaid; and that G. H., his attorney, resided at ——— about ——— miles from ——— aforesaid: And the said A. B. requested me, (or I was requested in behalf of the said A. B.) that the said E. F. might be examined according to the directions of the acts of congress in such case made and provided.

Whereupon I ordered that the said E. F. should be examined *de bene esse* before me at [and that] days notice should be given to the said C. D. (or G. H.) of such examination, to the end, that he might if he should see fit, be present at the examination and put interrogatories; and I having satisfactory proof that such notice had been given (a)] *and as well the said A. B. as the said C. D.* (or, if the defendant does not appear in person, or by attorney, then say, *the said A. B.*) appearing before me at on this day of I have therefore proceeded with the said examination.

And the said E. F. being carefully examined and cautioned, and duly sworn (or affirmed,) to testify the whole truth and nothing but the truth, saith, &c. (*stating clearly every pertinent declaration of the witness and his replies to the questions put by, or at the instance of either party.*) And I do further certify, that the preceding deposition was reduced to writing by me, (or by the said E. F. in my presence,) and signed by the said E. F. and that I am not of counsel or attorney for either of the parties to the said suit, nor am I interested in the event thereof. J. S.

PRACTICAL NOTE.

In proceeding under the act of Congress, Conkling lays down the following as the practice which should be followed. The first step in the proceed-

(a) If both the opposite party and his attorney reside more than one hundred miles distant, and no notice is on that account given, the part included in brackets is of course, to be omitted.

ing is to apply to some one of the officers authorized to take deposition, before whom the witness can most conveniently be brought, to take the deposition, *upon an affidavit setting forth* the grounds of the proceeding, so as clearly to bring the case within the provisions of the act: and in order to enable the officer to determine whether a notice to the opposite party, or his attorney if he has one, is required, (which it will be recollected is the case when either the party or his attorney, resides within one hundred miles of the place of caption) the affidavit should state the residence of the party and of his attorney. *Having obtained an order for the examination, serve a notice of the time and place appointed for that purpose, (if the case requires it,) upon the opposite party or his attorney, as the case may be. When notice is required, the officer cannot proceed to examine the witness without proof of its service. If the person to be examined refuses to attend voluntarily, he may, in the language of the act, "be compelled to appear and depose in the same manner as to appear and testify in court."*—

No. 7. Depositions under 67th rule U. S. Supreme Court after cause is at issue. See sec. 209 of preceding volume.

The depositions of A. B., C. D. and others duly taken before me, J. S., a commissioner duly appointed under the laws of the United States, to take affidavits and acknowledgments of bail, &c., (or as the case may be) pursuant to a commission and notice hereunto annexed, on the — day of —, between the hours of — A. M. and — P. M., at the office of — in the city of —, to be read as evidence in behalf of the plaintiffs in a certain suit in equity depending in the Circuit Court of the United States for the —, wherein J. B. and M. R. are plaintiffs and C. A. and O. P. are defendants; the interrogatories and cross interrogatories propounded to the said witnesses being the same enclosed with the commission aforementioned to me as commissioner as aforesaid (or as the case may be.)

A. B., one of the said witnesses being carefully examined, and cautioned, and duly sworn (or affirmed) to testify the truth, the whole truth and nothing but the truth, deposeth and saith as follows, in answer to the several interrogatories in chief:

To the first interrogatory in chief he says that, &c. (Here use the language of the witness.)

To the second interrogatory in chief he says that, &c. (As before.)

[And so on to the end of interrogatories in chief.]

And in answer to the several cross interrogatories, he says:

To the first, that &c., (using language of witness.)

To the second, that, &c., (as before, and so on to the end.) And further said witness saith not.

A. B.

The witnesses C. D., E. F. and G. H., not yet being examined and the hour of adjournment for these depositions having arrived, the taking of the same is, pursuant to the notice hereto annexed, adjourned and continued until to-morrow, at the same place and between the same hours.

J. S., *Commissioner* (or, as the case may be.)

— 18 .

Office of —, between the hours of — A. M. and — P. M.

The witness, C. D., being carefully examined and cautioned and duly sworn (or affirmed) to testify the truth, the whole truth and nothing but the truth, deposeth and saith as follows: In answer to the several interrogatories in chief (as before to the end.)

— *County, to wit:*

I, J. S., a commissioner, (or, as the case may be,) &c., to whom the annexed commission was directed, do hereby certify that the foregoing depositions were reduced to writing by me (or by the said witnesses in my presence) and signed by the said A. B., C. D., &c., and that the several proceedings therein mentioned were duly had and taken before me at the times and place mentioned therein; and I do further certify that I am not of counsel or attorney for either of the parties to the said suit, nor am I interested in the event thereof.

Witness my hand and seal [of office] this — day of — 18—.

J. S., *Commissioner* (or, as the case may be.)

It is not necessary to give the form of depositions taken under a *dedimus potestatem* under the act of Congress, or of depositions in *perpetuam rei memoriam*. The forms already given may be easily adapted to such cases.

PRACTICAL NOTES.

See p. 302, 303, 307, and note p. 422, *ante*.

To compel attendance of witnesses, &c., see sec. 224 preceding volume. See form of subpoena, *ante* p. 409 and adapt it to the cases mentioned in 1st and 2nd sections of statute.

IN VIRGINIA STATE COURTS.

See Book 1, chap. vi., preceding volume, especially sec 218, 223, 225, 228, 231, 242.

See preceding volume, sec. 222, as to officers authorized to take depositions in these courts.

No. 1. Commission to be used when witness out of State. (a)

THE COMMONWEALTH OF VIRGINIA, to A. B., a notary public for the county of — in the State of —, (b) greeting:

Know ye, that trusting to your fidelity and provident circumspection in diligently examining N. H., R. B. and C. D., witnesses in behalf of M. B. in a suit depending in our court for the county of —, wherein the said M. B. is plaintiff and X. Y., O. P. and Q. N. are defendants, we request and empower you that on such day and such place as you shall appoint, to call and cause to come the witnesses aforesaid before you, and them diligently examine on the Holy Evangelists of Almighty God, and their examination into the said court distinctly and plainly, without delay, you send and certify enclosed, returning also this commission.

WITNESS, P. R., clerk of our said court, at Richmond City, this — day of — 18 —, and in the — year of the Independence of the United States of America.

P. R., Clerk.

No. 2. Notice. (c)

To C. D. AND R. S.:

Take notice that we shall on the — day of —, at the office of H. and S., in the city of Richmond, between the hours of 6 A. M. and 6 P. M. of that day, proceed to take the depositions of R. G. and others, to be read as evidence in our behalf in a certain *suit in equity* depending in the Circuit Court for the County of Henrico, wherein you are plaintiffs and we are defendants; and if, from any cause, the taking of the said depositions be not commenced on that day, or, if commenced, be not concluded on that day, the taking of the same will be adjourned and continued from day to day, or from time to time, at the same place and between the same hours until the same shall be completed.

Respectfully yours,

A. B.,
D. L.

No. 3. Caption of depositions, adjournment, &c.

The depositions of R. G. and others, taken before me, A. H. S., a notary public (or *justice of the peace*) for the city of Rich-

(a) A notice in this case is necessary as in others. See notice, No. 2.

(b) See sec. 223 of preceding volume.

(c) This notice should be given whether deposition of witness be taken in or out of the State. When a party on whom notice to take deposition should be served is not a resident of Virginia, notice may be served on his counsel if the time between the service of notice and taking of the deposition be sufficient for conveying by ordinary course of mail, a letter from the place of service to the place of residence of the party, and a reply from that place back to the place of service and then for the counsel to attend at the place of taking the deposition. See Sess. Acts. 1852, p. 76.

mond, pursuant to notice hereto annexed, at the office of H. and S. in the city of Richmond, on the — day of —, between the hours of 6 A. M. and 6 P. M., to be read as evidence on behalf of A. B. and D. L. in a certain suit in equity depending in the Circuit Court for the County of Henrico, wherein C. D. and R. S. are plaintiffs, and the said A. B. and D. L. are defendants.

Present: A. A. M., counsel for plaintiffs.

J. M. P., counsel for defendants.

R. G., being duly sworn on the Holy Evangelists of Almighty God, deposeth and saith as follows:

1st question by J. M. P., counsel for defendants. What is your age?

Answer.

2d question by same. Do you know the parties to this suit?

Answer.

[Continue the questions until conclusion of examination in chief as above, and, in every instance, write the answers of witness, using his words.]

Cross-examined.

1st question by A. A. M., counsel for plaintiffs. (Write questions and answers as before.)

Re-examined.

3d question by counsel for defendants. Are you &c., &c.?

Answer. I am, &c., &c.

And further this deponent saith not.

R. G.

No other witness appearing, the further taking of these depositions is continued until to-morrow, at the same place and between the same hours.

A. H. S., N. P. (or, J. P.)

day of 18 .

Present: A. A. M., counsel for plaintiffs.

J. M. P., counsel for defendants.

K. M., being duly sworn on the Holy Evangelists of Almighty God, deposeth and saith as follows:

1st question by counsel for defendants. (Write down questions and answers as in deposition of R. G.)

K. M.

STATE OF VIRGINIA,

City of Richmond, to wit:

I, A. H. S., a notary public (or justice of the peace) for the city aforesaid, in the said State, do hereby certify that the foregoing

depositions were duly taken, sworn to and subscribed before me at the times and place mentioned therein:

Given under my hand this day of , 18 : (a)
A. H. S., N. P. (or, J. P.)

No. 4. Form of summons requiring attendance of witnesses.

THE COMMONWEALTH OF VIRGINIA,

To the Sheriff of the City of Richmond, Greeting :

We command you that you summon R. G., L. M. and N. O., to appear at the office of H. and S. in the city of Richmond, on day of , before A. H. S., a *notary public for the said city duly commissioned and qualified* (or a *justice of the peace for said city*), to testify and the truth to speak on behalf of A. B. and D. L. in a matter of controversy pending in the Circuit Court for the County of Henrico, between C. D. and R. S., plaintiffs, and the said A. B. and D. L., defendants: And have then there this writ.

Given under my hand this day of , 18 .
A. H. S., N. P. (or, J. P.)

No. 4. Report of non-attendance of witnesses.

To the Court for the City of Richmond :

N. O., who was duly summoned to appear before me, A. H. S., a *notary public* (or *justice of the peace*) for the city aforesaid, on the day of , at the office of H. and S. in said city, to testify and the truth to say on behalf of A. B. and D. L. in a matter of controversy pending in the Circuit Court for the County of Henrico between C. D. and R. S., plaintiffs, and the said A. B. and D. L., defendants, has failed to attend at the time and place required, and I am requested to report the fact to this court that proper means may be used to compel the attendance of the said witness.

Respectfully reported,

A. H. S., N. P. (or J. P.)

PRACTICAL NOTES.

Eminent counsel have doubted the correctness of the statement *ipsi-mis verbis* made in section 220, to wit: that depositions may be taken before the parties are at issue. They think that the plaintiff *alone* has the right to examine witnesses *before* the defendant has appeared and pleaded or answered. Two of the judges of the Circuit Courts of Virginia have decided otherwise and sustain the principle announced in that section and in the note thereto. The question has not been determined by the Supreme Court of Appeals of Virginia.

(a) It has been the practice in Virginia when depositions are taken by notaries, for the notaries to annex their seal. This is not required by the statute: A certificate under the hand of the notary is sufficient.

IX.

Orders and Decrees in the United States Circuit Courts and in Virginia State Courts.

IN UNITED STATES CIRCUIT COURTS.

GENERAL FORMULA.

The formal part of decrees in these courts has already been set forth in preceding volume, section 249 ; this formal part should precede the forms hereafter given, when to be used in these courts.

Decree for account.

The court doth order and decree, that it be referred to Mr. E. one of the Masters of this Court, to take a mutual account of all dealings and transactions between the plaintiff and the defendant; to the better clearing of which account, the parties are to produce, &c. (*books, documents, &c., &c., &c.*) as the said Master shall direct, who, in taking of the said account, is to make unto the parties all just allowances, and what, upon the balance of the said account shall appear to be due from either party to the other, is to be paid as the said Master shall direct. And it is further ordered, that the injunction formerly granted in this cause, for stay of the defendant's proceedings at law, be in the mean time continued, and the defendant's judgment is to stand a security for payment of what, if any thing, shall appear to be coming to him on the balance of the said account; and the court doth reserve the consideration of the costs of this suit, and of all further directions, until after the said Master shall have made his report, when either side is to be at liberty to apply, &c.

Order granting injunction in case of copyright.

This court doth order that an injunction be awarded to restrain the defendant, his servants, agents, or workmen, from printing, publishing, selling, or otherwise disposing of the book in the bill mentioned to have been published by the defendant, until the said defendant shall fully answer the plaintiff's bill, or this court make other order to the contrary.

Decree for perpetual injunction restraining infringement of copyright.

It is ordered, &c. that the injunction formerly granted in this cause for stay of the defendants, their servants, agents, or workmen, from printing, publishing, or vending, a book, comedy, or farce, called "Love à-la-mode," or any part thereof, be made perpetual. And the plaintiff waiving the account prayed by the bill, the court doth not think fit to direct any account. And it is further ordered, that the defendants do pay to the plaintiff his costs of this suit, to be taxed, &c.

Decree for perpetual injunction to restrain infringement of copyright and for payment of profits.

Upon the coming in of the Master's report, and on motion of the complainant's counsel, it is ordered and decreed by the court, that the said report be confirmed and established, and that the said defendant B. and his agents and servants be perpetually enjoined from making, using, or vending to others to be used, any one or more locks substantially the same in mode of operation as the lock described in the letters patent in the said bill of complaint mentioned.

And the court doth further order and decree that the said defendant B., do forthwith pay unto the said complainant Allen, the sum of eleven thousand seven hundred dollars, being the amount of profit found by the said Master's report to have been received by the said B. and his copartner S., mentioned in the said bill of complaint, from the sale of locks substantially the same in mode of operation, as the lock described in the said letters patent, in violation of the exclusive right of the complainant, secured to him by the letters patent aforesaid. And the court doth further order and decree that the said defendant B. do pay to the said complainant Allen the costs of this suit taxed at ———.

IN VIRGINIA STATE COURTS.

FORMULA OF DECREES.

Formula of decree in which guardian ad litem assigned infant defendants in court, his answer filed, &c.

A. B., (or, A. B., an infant of tender years, by R. L., his next friend, or, A. B., a feme covert, by R. L., her next friend,) and C. H., *plaintiffs*, against M. B., J. W., R. K., L. C. and B. R., (the two last infants under the age of twenty-one years,) *defendants*.

R. N. (a) is assigned guardian ad litem to the infant defendants, L. C. and B. R. to defend their interests in this suit, and thereupon the said R. N. as such guardian filed his answer to the bill of the plaintiff, to which answer the plaintiff by counsel replied generally and the cause coming on to be heard on the bill, taken for confessed as to the defendant R. K., the answers of defendants J. W. and M. B. and of the said guardian ad litem with general replications thereto, on the exhibits and examinations of witnesses, was argued by counsel. On consideration whereof, the court doth adjudge, order and decree, &c., &c.

Another formula in a case in which there are absent and unknown defendants—and in which a guardian ad litem has been assigned infant defendants at rules.

A. B., &c., (as before,) *plaintiffs*, against M. B., J. W., L. C. and B. R., (the two last named being infants under the age of twenty-one,) by R. N., their guardian ad litem assigned to defend them in this suit, M. P. and the unknown heirs at law and distributees of X. Y., deceased, *defendants*.

This cause, in which the plaintiffs have proceeded against the said M. P. in the mode prescribed by law against absent defendants; and as to the unknown heirs at law and distributees of X. Y., deceased, in the mode prescribed by law against unknown defendants, came on this day to be heard on the bill, the answers of the home defendants, and of the infant defendants by their guardian ad litem, R. N., assigned to defend them in this suit, general replications to the said answers, exhibits and examinations of witnesses, and was argued by counsel. On consideration whereof, the court doth adjudge, order and decree, &c., &c.

Another formula in which bill has been taken for confessed as to part of the defendants, answers of the remainder, depositions, &c.

(Names of parties.)

This cause came on this day to be heard on the bill, taken for confessed as to the defendants, B. M. and J. W., on whom process had been duly served, they still failing to appear and plead, answer and demur to the said bill; on the answers of the defendants L. W. and K. M., with general replications thereto, on the exhibits and examinations of witnesses, and was argued by counsel. On consideration whereof, the court doth adjudge, order and decree, &c.

(a) The clerk of the court in which suit is pending is usually assigned the guardian ad litem. A guardian ad litem may be assigned in term time as well as at rules. See Code of Virginia, chap. 171, sec. 16.

Revival of suit against personal representative of one of the defendants, against the real representatives of another and decree. (b.)

A. D., plaintiff, vs. C. D., M. N. and others, defendants.

The scirefacias awarded against R. Q., administrator de bonis non with the will annexed of the defendant, C. K., deceased, returnable to this term, having been returned executed on the said R. Q., administrator as aforesaid, and the said R. Q. failing to shew any cause why this suit should not be revived against him in his character aforesaid, it is ordered that the same be revived and henceforth be conducted against the said R. Q. as administrator de bonis non, with the will annexed of the said C. K., deceased; and it further appearing that the scirefacias awarded at the last term against L. B., D. W. and N. O., children and heirs at law of the defendant, R. M., deceased, returnable to this term, has been duly executed on the said L. B., D. W. and N. O., and they failing to shew any cause why this suit should not be revived and prosecuted against them, as such children and heirs at law of the said R. M., deceased, it is ordered that the same be revived and henceforth be conducted against the said L. B., D. W. and N. O. as defendants to this suit; and thereupon this cause coming on to be heard, &c., &c., was argued by counsel. On consideration whereof, the court doth adjudge, &c., &c.

Formula of entry in case of friendly bill and answer, &c. (a)

R. B., plaintiff, against C. W. and J. M., the last named an infant under the age of twenty-one years, defendants.

This day came the plaintiff and filed his bill, and on his motion B. W. is assigned guardian ad litem to the infant defendant, J. M. to defend his interests in this suit, and thereupon the said guardian ad litem filed the answer of the said infant, J. M., to the bill of the plaintiff, and the defendant C. W. filed his answer, to which answers the plaintiff replied generally, and the cause coming on to be heard upon the bill, the said answers, general replications thereto, and exhibits, was argued by counsel. On consideration whereof, the court doth adjudge, order and decree, &c., &c.

(b) See preceding volume, sections 88, 89, 90.

(a) A friendly bill and answer is the well known title applied to a cause in which there is no controversy between the parties, and when they each desire the aid of the court to have some action taken which they cannot take independently of its aid. Such a bill, to instance, is usually filed in the case of a sale of lands of person under disability.

DECREES FOR ACCOUNTS.

Decree for settlement of accounts.

(Names of parties.)

This cause came on, &c., (*as in formula preceding.*) On consideration whereof, the court doth adjudge, order and decree that the defendant do render an account of the partnership in the bill mentioned (or, an account of his dealings as, &c., in the bill mentioned) before one of the commissioners of this court, who is directed to examine, state and settle the same, and make report thereof to the court, with any matters specially stated, deemed pertinent by himself, or which may be required by any of the parties to be so stated.

NOTE.—A party applying to a court of Equity for an account, subjects himself through plaintiff to a decree for a balance due from him to defendant. *Hill et als., v. Sutherland's ex'rs.*, 1 Wash. 128; *Fitzgerald ex'r, v. Jones*, 1 Munf. 150. See also *Payne v. Graves*, 5 Leigh 561.

Decree for settlement of administration and guardianship accounts of an intestate, also for settlement of administration account of intestate's estate unless administrator will admit assets.

R. T. H. and Sarah E., his wife, *plaintiffs*, against P. S. J., administrator of M. T., deceased, who was administrator de bonis non of S. W., deceased, and guardian of Sarah R. W., T. R., L. R. and R. C. M., *defendants*.

This cause, in which the plaintiffs appear to have proceeded against the defendant, R. C. M., who is out of this commonwealth, in the manner prescribed by law against absent defendants, and he still failing to appear and answer, came on this day to be heard on the bill, which has been taken for confessed as to all the defendants, except M. T., the intestate of the defendant, P. S. J., upon the answer of the said M. T., filed in his life time, with general replication thereto, and the exhibits filed and was argued by counsel. On consideration whereof, the court doth adjudge, order and decree that the defendant P. S. J., administrator of M. T., deceased, who was administrator de bonis non with the will annexed of S. W., deceased, and guardian of Sarah R. W., do render an account of the transactions of the said M. T. as administrator as aforesaid, and also an account of the transactions of the said M. T., as guardian as aforesaid, before one of the commissioners of this court; in rendering which account, the said defendant is required to produce before the said commissioner all necessary papers and vouchers in his possession or under his control, relating to the transactions of the said M. T. as administrator and guardian as aforesaid, in order to enable the said commissioner to state the said accounts. And the said commissioner is directed, in taking

the said accounts, to regard as prima facie correct, but liable to be surcharged and falsified by the plaintiffs, any settled accounts of the said administrator and guardian, made under orders of a court of competent jurisdiction and returned to and ordered to be recorded by such court.

And unless the defendant P. S. J., administrator of M. T., deceased, shall admit assets of his intestate in his hands sufficient to satisfy any balances which may appear against his said intestate's estate, upon the settlement of the accounts above directed, then the court doth further adjudge, order and decree that the said defendant render before the said commissioner an account of his own administration of the estate of the said M. T., dec'd.

All which accounts the said commissioner will examine, state and settle and report to the court, with any matters specially stated, deemed pertinent by himself, or which may be required by any of the parties to be so stated.

A notice of the time and place of taking the aforementioned accounts to be published once a week for four successive weeks in some convenient newspaper shall be equivalent to personal service of such notice on the parties.

Decree overruling some exceptions to report, sustaining a part of one of them and directing payment of balances found due on settlement of administration and guardianship accounts.

(Names of parties.)

This cause came on this day to be again heard on the papers formerly read, and the report of commissioner W. made in pursuance of the interlocutory decree entered herein on the twenty-third day of January, eighteen hundred and forty-nine, and upon the exceptions of the plaintiffs and the defendant, P. S. J., administrator of M. T., deceased, returned with the said report, and also upon the exceptions of the said defendant this day filed, and the examinations of witnesses and exhibits filed since the former hearing and was argued by counsel. On consideration whereof the court doth overrule all the exceptions of the plaintiffs to the said report, and doth also overrule all the exceptions of the said defendant P. S. J., administrator as aforesaid, except so far as one of the said exceptions of the said defendant refers to and embraces the first item in special statement F., made by the commissioner at the instance of the said defendant, to wit: the item of ninety-nine dollars and thirty-nine cents in the said special statement, under date of the sixth day of January, eighteen hundred and forty-eight, for provisions furnished the slaves Elvira and Emily, as to which item and the interest thereon the court is of opinion that the same should have been allowed as a credit to the estate of the said M. T., deceased, and that the balance of eight thousand four hundred and eighty-three dollars and twenty-eight cents, reported by the commissioner as due to the plaintiffs

should be reduced by the said sum of ninety-nine dollars and thirty-nine cents, and the interest thereon amounting to five dollars and ninety-five cents, leaving the sum of eight thousand three hundred and seventy-seven dollars and ninety-four cents due to the plaintiffs on the thirty-first day of December, eighteen hundred and forty-nine, for which, in the opinion of the court, they are entitled to a decree, and the court confirming the said report in all other respects, and it appearing therefrom by the special statement E., made by the commissioner at the instance of the said defendant P. S. J., administrator as aforesaid, that he has assets of his intestate in his hands sufficient to satisfy this decree, the court doth adjudge, order and decree that the defendant P. S. J., administrator of M. T., deceased, do pay to the plaintiffs the said sum of eight thousand three hundred and seventy-seven dollars and ninety-four cents, with interest thereon to be computed after the rate of six per centum per annum from the thirty-first day of December eighteen hundred and forty-nine until paid, and their costs by them about their suit in this behalf expended.

Decree for settlement of executorial or administration accounts.

R. L. B. and M. E., his wife, and others, *plaintiffs*, against N. A., administrator of W. F., deceased, (*or executor of the last will and testament of W. F., deceased,*) *defendant*.

This cause came on this day to be heard upon the bill, answer and exhibits and was argued by counsel, on consideration whereof the court doth adjudge, order and decree that the defendant, N. A., do render an account of his administration of the estate of his intestate, W. F., (*or an account of his executorial transactions as executor of the last will and testament of his testator, W. F., deceased,*) before one of the commissioners of this court, who is directed to examine, state and settle the same and report the same to the court with any matters specially stated deemed pertinent by himself or which may be required by any of the parties to be so stated.

Decree for distribution of estate after return of commissioner's report made under next preceding decretal order.

(Names of parties.)

This cause came on this day to be fully heard on the papers formerly read, and the report of the commissioner, made in pursuance of the order of the 8th day of June, 1822, and was argued by counsel. On consideration whereof, the court doth adjudge, order and decree, that the defendant F. F. (a) do pay to the plaintiff,

(a) A decree against an executor or administrator for a balance due on his administration account ought not to be "that he pay the same out of the

P. F., the sum of \$96 32, with interest thereon from the 31st day of December, 1822, until paid; to R. F., executor of W. F., the sum of \$5 31, with interest thereon from the same time until paid; and to R. F., D. B. F., N. F. each, and to H. G. and R. his wife, each, the sum of \$62 57 cents with interest thereon from the same time until paid; but the plaintiffs are not to have the benefit of this decree until they shall enter into bond with sufficient security, in the clerk's office of this court, payable to the defendant F. F., executor of F. M. F., deceased, in a penalty equal to double the sums decreed to them respectively, with condition to refund due proportions of any debts or demands which may afterwards appear against the estate of his testator, and the costs attending the recovery of such debts or demands. (b) And the court doth further adjudge, order and decree, that the defendants do pay to the plaintiffs their costs by them about their suit in this behalf expended. (c)

[And liberty is reserved to the infant defendants to show cause against this decree, at any time within six months after they shall respectively have attained their full age.] (d)

NOTE.

The court cannot decree a distribution in favor of persons not parties to the cause: *Sheppard's ex'or v Starke and wife*, 3 Munf. 29.

estate in his hands to be administered" but *as his own proper debt*. *Sheppard's executor vs. Starke and wife*, 3 Munf. 29. See *Moore's executrix vs. Ferguson, et als.* 2 Munf. 421, and *Barr vs. Barr's administrators*, 2 Hen. and Munf. 26.

But it is error to make a personal decree against an administrator without an account or admission of assets in his hands sufficient to satisfy the decree. *Wills' administrator. v. Dunn's administrator*, 5 Grat. 384.

(b) Should clause requiring refunding bond be omitted, if it appear that such omission was not intentional but the result entirely of inadvertence, an appellate court would not reverse the decree with costs for that omission alone; but if in such case the decree in other respects was right, the court will affirm it so far as it goes, with costs to the appellee as the party substantially prevailing and will proceed to make such further decree in relation to refunding bond as the court below ought to have made. *Handly v. Snodgrass and als.*, 9 Leigh 484. See the following cases in relation to refunding bonds, *Stovall's executor v. Woodson and wife*, 2 Munf. 303. *Sheppard's executor v. Starke and wife*, 3 Munf. 29.

(c) In a suit for distribution, though there is a decree for the plaintiff, yet if the administrator has been in no default he shall have costs. *Eidson v. Fontaine's administrator et als.*, 9 Grat. 286.

(d) This reservation not now necessary. See Code of Virginia, chap. 178, sec. 7.

PRACTICAL NOTES TO PRECEDING DECREES FOR ACCOUNTS, &c.

Accounts Generally.—When equity entertains jurisdiction in cases of accounts, see Hunter's exor. and als. v. Spotswood, 1 Wash. 145; Bland's admr. v. Wyatts, 1 H. and M. 543; Hickman v. Stout, 2 Leigh 6; Sturtevant v. Goode, 5 Leigh, 83. When equity refuses to entertain jurisdiction in such cases. See Randolph's ex'rs. v. Randolph and als., 2 Call., 537; Smith v. Marx, 2 Rand., 449; Poage v. Wilson, 2 Leigh, 490; Bassett's adm'r v. Cunningham's adm'r, 7 Leigh, 402.

In an equity cause when a replication has been entered and afterwards withdrawn, it is error for the court to order an account or to render a decree until a new issue is made up. *Clark v. Tinsley's adm'r*, 4 Rand., 250.

It is a general rule that when a party claims to charge another by virtue of an account rendered, he must take that account altogether and not garble or falsify the same, unless he can surcharge and falsify it either by showing errors in calculation or by showing from other testimony that it is incorrect; Freeland, &c., v. Cocke's representatives, 3 Munf. 352. See Waggoner v. Gray's administrators, 2 Hen. and Munf., 603; but this rule is altered in cases in which the party keeping the account holds some trust or confidence for the faithful execution of which he is required to keep an accurate account. See Robertson and als. v. Archers adm'r, 5 Rand., 319.

It is not sufficient in an account to charge balances of other accounts as rendered and agreed: the accounts alleged to have been agreed must be produced if in existence and proven as alleged, unless there be proof of the defendants acknowledgment of the justice of such accounts or of his promise of payment, Lewis' ex'or. v. Bacon's legatees and als., 3 Hen. and Munf., 89. In this case a creditor kept an account current with his debtor and also an interest account in which he charged interest on the several payments to the same period and charged in the *account current* the balance appearing in the *interest* account. A balance being then struck and a new account opened, in which interest was charged on that balance, thus consisting of principal and interest, *held* to be compound interest and not allowable.

An acknowledgment by *feme covert* is not sufficient to establish an account against her husband, though it be for articles furnished her before her marriage. Sheppard's ex'or. v. Starke and wife, 3 Munf., 29.

An injunction is granted to a judgment, and an account directed between the parties, credit ought not to be given to the plaintiff at law by the commissioner for certain items not exhibited to the jury, nor mentioned in the answer, and which are prior to the commencement of the suit. Lipscomb's adm'r. vs Littlepage's adm'r., 1 H. & M., 454. Account directed after a purchaser at fraudulent sale refuses obedience to order of court requiring delivery of slave. See McNew v. Smith, 5 Grat., 84.

Accounts of Executors, &c.

The account of an executor having been settled by commissioners ap-

pointed by the court before which the will was proved, is not of course to be referred again to a commissioner, on a bill to surcharge and falsify ; but some evidence should be exhibited to that effect, or something improper in the account should be disclosed in the answer ; otherwise such order of account should not be made, but the bill should be dismissed. *Willie et ux. v. Venable's ex'or*, 4 Munf. 369.

When the answer of a defendant executor, asserts a right affirmatively in opposition to the plaintiff's demand the defendant is as much bound to establish its assertions by indifferent testimony as the plaintiff is to sustain his bill. It would be monstrous indeed, if an executor, when called on to account, were permitted to swear himself into a part of his testator's estate. *Beckwith v. Butler and als*, 1 Wash. 225.

An executor's account rendered on oath is *prima facie* evidence of the sums received by him for the estate of his testator, and of the times when received. *Cavendish v. Fleming*, 3 Munf. 198.

An executor is not to be charged with the debts due to the estate of his testator, at the time when they became due, but only at the time when he actually received them, excepting such debts as are lost by his negligence or improper conduct. *Cavendish v. Fleming*, 8 Munf. 198. He is, save when debts are thus lost, only chargeable with interest on his actual receipts. *Ibid*.

An executor or administrator may, with propriety, be credited for deductions made by him from accounts left by his testator or intestate, for collection ; it appearing that his course might have produced benefit to the estate, the court not perceiving that he could have had any interest in making the deductions. *McCall v. Peachy's adm'r*, 3 Munf. 288.

An executor or administrator is not chargeable specifically with tobacco received by him, and not disbursed on account of his testator's estate, but only with the price actually received for the tobacco, where that can be ascertained ; and where not, with the then current value thereof. *Ibid*.

Where an *ex parte* settlement of an administration account has taken place before commissioners appointed by the court in which the executor or administrator qualified ; if the legatees afterwards bring a suit in Chancery for a new examination and settlement of such account, the vouchers in support thereof, if they be not ostensible, should be presumed to have existed, and the *onus probandi* thrown on the adverse party. *Ibid*.

In such case, if the vouchers or official copies of them be produced, the plaintiffs may nevertheless controvert the articles intended to be justified by them. *Ibid*.

An article ought to be allowed on the oath of the defendant, if it be of such a nature that the expense probably must have been incurred, or that, perhaps, a voucher for it could not have been procured ; for example,

mourning for the widow, midwife's fees, services performed by a negro carpenter, and the like. *Ibid.*

When a commissioner is stating accounts between executors and the estate of their testator, if one of them who had for collection the evidences of debt due the estate, which might have been collected by him, be dead, his representative can not object to his estate's being charged with those debts unless the means be furnished the devisees of charging the surviving executor therewith; *Carter's Ex'or v. Cutting et ux.*, 5 Munf. 223, and in such case each executor's private account with testator and with his co-executor, and all accounts that are necessary to make a just settlement of the matters in controversy ought to be taken if requested, though not specifically put in issue in the cause. *Ibid.*

'To make an executor answerable for paper money, at the scale of the day on which he received it, is in general wrong; but, if he hath charged himself so, and pointed out no other mode of adjusting it, he shall be bound by his own act. *Granberry's ex'or v. Granberrys*, 1 Wash. 246.

Where an executor claims a sum of money advanced to him by his testator, in his lifetime, as a gift, and not a loan; this claim will not be allowed on the executor's oath, and slight circumstances; especially (as in this case) when the name of the executor is present to the testator's mind while making his will and the object of his bounty. *Ruth et al v. Owens*, 2 Rand. 507.

An administrator is entitled to credit in his account as of the date of division of estate for moneys expended in permanent improvements on the real estate of the heirs. *Jackson's adm'r v. Jackson's heirs*. 1 Grat. 143.

'To ascertain the amount of credit in this case the cost of improvements subject to deduction for decay from the time of erection to date of the division, would be the proper measure. *Ibid.*

The rule that where a party relies on account furnished by the other party, he is bound to take it altogether and admit the debts as well as the credits, unless he can surcharge and falsify it by proofs is not applicable to an executor's account (not rendered before commissioners appointed for the settlement of the same;) this was so held because the executor was under a moral and equitable, and indeed a legal obligation, to furnish those to whom he was accountable the means of charging him to the full extent of his liabilities. (a) *Robertson and als. v. Archer, adm'r.*, 5 Rand. 319.

The rule that administration accounts, audited *ex parte* by commissioners appointed by the proper court, returned to the court and recorded, are to be taken as *prima facie* correct, liable to be surcharged and falsified on proof adduced by any party interested, rests not on the ground that such audited accounts stand on the same footing as stated accounts between

(a) See *White v. Lady Lincoln*, 8 Ves. 363.

parties, but mainly on the long established practice of the country, and on the supposed integrity of the tribunal provided by law for the adjustment thereof: therefore, such audited accounts are only to be corrected in the particulars in which they are proved to be erroneous unless corruption in the tribunal itself be established, and though great and numerous errors appear, or even though the executor or administrator appear to have taken an unfair advantage, does not return to the court, or exhibit to the auditors an inventory or appraisement of the estate, yet the audited accounts are to be taken as *prima facie* evidence, to be corrected so far as surcharged and falsified by proof. *Newton et. ux v. Poole*, 12 Leigh, 112.

Upon a bill to surcharge and falsify an executor's account, audited by commissioners of county court, and approved and recorded, though plaintiff is held to specification of items of surcharge and falsification, yet it is always competent for him to show, that the account is erroneous upon its face, and (without controverting the items,) to show that they have been so arranged as to produce results injurious to him. *Garrett, ex'or, &c., v Carr and wife*, &c. 3 Leigh, 407.

Executor sells a slave belonging to his testator's estate, the sale not being necessary for the payment of debts, and he re-purchases the slave and thereupon holds him as his own. The slave is the property of the estate, and the executor shall account for his annual hires, with interest thereon, though he was not in fact hired out by the executor. *Rosser ex'or of Wood v. Depriest et als.* 5 Grat. 6.

An executor takes bonds for purchases made at a sale by himself of testator's personal estate, and it does not appear when these bonds were paid off. He will be charged with the principal of the bonds in the year when they fell due, but with interest only from the end of the year. *Ibid.*

An administrator having failed to render an account of crops, rents and hires which came to his hands, proof of the estimated net annual value may be resorted to for the purpose of charging him. *Wille' adm'r v. Dunn's adm'r.* 5 Grat. 381.

Bonds taken by an administrator not necessary for the reimbursement or indemnity of decedent's estate, will be turned over to the administrator *de bonis non* as unadministered assets. *Clarke v. Well's adm'r.* 6 Grat. 475.

Administration accounts should not be closed before the time when all the debts are paid. *Boyd's ex'rs v. Boyd's heirs.* 3 Grat. 113.

An executor having the management of both real and personal estate, and making disbursements in the administration of the estate, and also for the support of the family; in the settlement of his accounts, he is to be credited in his administration account with his disbursements as executor, and in his account of the real estate, with his disbursements for the family. *Hobson v. Yancey et als.* 2 Grat. 73.

Executors not keeping their accounts properly, are to be held to a rigid

accountability, yet this is not of itself sufficient to deprive them of their commissions. *Kee's ex'r v. Kee's creditor*, 2 Grat. 116.

An administrator or executor is not bound to sue for the recovery of a debt due the estate, where it is apparent the debtor is not able to pay it. *Mitchell's adm'r v. Trotter and wife*, 7 Grat. 136.

An executor is not chargeable with interest on a legacy, payable to an infant, before a guardian has been appointed, and he has received notice of such appointment. *Cavendish v. Fleming*, 3 Munf. 198. See also *Dilliard v. Tomlinson et als.*, 1 Munf. 183.

An executor or administrator is chargeable with interest in all cases where he has received it, and also where paper money or specie remained in his hands more than a reasonable time, (which, in this case, was said to be six months,) without being applied to the purposes of the estate. *McCall v. Peachy's adm'r*, 3 Munf. 288.

If an executor think that lending on interest the money in his hands would be dangerous, or find a difficulty in procuring borrowers, he ought to apply to the chancellor for his direction, or pay the money into court. *Granberry's ex'or, v. Granberrys*, 1 Wash. 246.

The propriety or impropriety of charging an executor with interest, must always depend on the particular circumstances in each case. The general rule adopted in *Granberry v. Granberry*, is not deemed inflexible, and there may be strong cases in which to prevent gross injustice it may bind. Such a case was that of *Fitzgerald v. Jones*, 1 Munf. 150. And it seems unreasonable, that where a very large sum has been received in the last month of one year, and paid away again in the first month of the succeeding year, or vice versa, to burden the executor on the one hand, or the estate on the other, with a full year's interest on such sum. See opinion of Tucker, president, in *Burwell's ex'ors, v. Anderson, adm'r*, 3 Leigh, 364. See *Wood's ex'or v. Garnett*, 6 Leigh 272.

Interest is not usually allowed upon conjectural and unliquidated hires. *Baird v. Bland*, 5 Munf. 492. For until they are ascertained, the party is no no default for not paying. *Shields adm'r v. Anderson*, 3 Leigh, 729. If, however, an executor has hired out the slaves, and has actually received the hires, there he will be chargeable with interest on the money so received, as upon money received by him in ordinary cases. *Quarles's ex'r v. Quarles*, 2 Munf. 321. In the case of *Crosse's curatrix, v. Crosse's legatees*, 4 Grat. 257, it was held by the Court of Appeals that although there may be circumstances which may exempt an executor from being charged with interest on balances in his hands, yet in general, an executor is chargeable with interest on such balances; and where, in an *ex parte* settlement by commissioners of an executor's accounts, the commissioners improperly omit an interest account, and charge the executor with interest, that is cause for surcharging and falsifying the account. *Burwell's ex'ors, v. Anderson adm'r, &c.*, 3 Leigh, 348.

The Court of Appeals in *Burwell ex'ors, v. Anderson's adm'r &c.*, just cited, prepared a formula, exhibiting the manner in which accounts of executors and administrators should be settled. See this formula on the next page.

Accounts of guardians.

A second guardian of an infant has no authority to file a bill in his own name against a former guardian, for an account of his transactions in relation to the ward's estate. *Lemon, guardian, v. Hansbarger*, 6 Gratt. But an infant may by his next friend call the acting guardian or any ceding guardian to account by a bill in chancery; in such case the must be in his own name by his next friend. *Ibid.* (See *Sillings et al. v. Bumgardner, guardian*, 9 Gratt. 273.)

A guardian of infants is entitled to compensation for their support, though he may have promised their friends that he would not make charge for it, and has kept no account against them. *Armstrong's v. Walkup and others*, 9 Grattan, 372.

A payment made to the husband of one of those who had been ward and who is the guardian of another of them, though intended to be a payment to all, is not to be credited against the third ward, who is then an infant, she not having authorised him to receive it; but is to be credited against the husband and wife, and his ward. *Ibid.*

The accounts of the three wards should be stated separately from the commencement or at least from the time when their expenses differ in amount. *Ibid.*

One of the wards being still an infant, there should not be a joint decision in their favor though made with the consent of the next friend of the infant. *Ibid.*

The principal on which interest should be charged to guardians is the account as settled in *Garrett, ex'r, &c. v. Carr and ux.* 1 Rob. 196, which has been incorporated in the Code of Virginia, chap. 128, sec. 10. See Code of Virginia, chap. 127.

The form of a guardian's account settled upon the principles of the decision in *Garrett, ex'r, &c. v. Carr and ux.*, 1 Rob. 196, and in conformity to the provisions of Code of Virginia, may be seen on next page :

Cr.

			Profits.		Principal.	
1850. June 30.	To disbursements commission of James \$50, rent of cent, " p. I. B. balance		245	00	1500	00
			\$245	00	1500	00
		Disbursements,		900 00		
		(interest,)		\$9380 00		
1826. Dec. 31.	To disbursement balance,		10000	00	800	
			10000	00	\$800	
1827.(d) Dec. 31.	To disbursement balance of principal, to account of principal to		2000 00			
			120 00			
			800 00			
			1080 00			
			\$4000 00			
1828.(a) Dec. 31.	To balance per interest the balance due		11144	80		
			\$11144	80		
1829. Dec. 31.	To disbursement balance due		10000	00	600	
			\$10000 00		\$600	
1830. Dec. 31.	To disbursement balance, (a	all interest,) of principal to meet the	600 00			
			\$600 00			
1831. Dec. 31.	To disbursement balance,		4000	00	100	
			\$4000 00		\$100	
			3500	00	\$100	

(a) In the years may allowed interest, but when he is in advance for.

(b) In the years may disbursements. A balance then appears due on that balance for the being all interest, is, in the account of the sug- and all the disbursement into the in interest column on the credit

(c) In the year may the disbursements discharge the whole of the interest on that balance, and give a balance due to the executor, on against the disbursement the next year.

Accounts of Trustees.

Trustee in Trust Deed: As to disbursements, commissions and interest, see 4 H. and M. 415; 6 Munf. 99, also Code of Virginia, chap. 132, sec. 18. See notes on executors and administrators accounts.

Commissions of fiduciaries.

See Code of Virginia, chap. 132, sec. 8; also sec. 18. 1 Wash. 246; 2, Call 102, 190; 1 Munf. 150; 2 Munf. 243; 3 Munf. 29, 198, 289; 4 Munf. 83; 5 Munf. 224; 2 Rob. 582.

As to when commissions are forfeited by trustees, see Code of Virginia chap. 132, sec. 4; see also 4 H. and M. 415. 6 Munf. 99.

Commissioners' report.

A decree confirming a commissioner's report may be reversed, where under a general order of reference of all accounts, he states an account as to one subject only, omitting others which ought to have been settled. *Harris v. Magee*, 3 Call, 502.

On the motion of a defendant to recommit report of commissioner, the motion as far as it goes to open the accounts anew is overruled on account of defendants neglect or contumacy; but he may show himself entitled to credits not considered by the commissioner, it appearing from the evidence in support of his motion, that he is entitled to such credits. *Snickers v. Dorsey*, 2 Munf. 505.

On bill of injunction to stay proceedings on a judgment at law, if it appear from commissioner's report, not excepted to by defendant, that the complainant is entitled to a credit which the defendant failed to give, the court ought not to set aside the order for account, and dismiss the bill, on the ground that the complainant had neglected to carry into effect a previous order, referring, by consent of parties, the accounts between them to different commissioners; but the last order having been made on the defendant's motion, the report being excepted to for want of notice to the complainant of the time and place of taking the account, and such exception appearing well founded, a new account ought to be directed to be taken. *Roberts v. Jordan*, 3 Munf. 488.

An error appearing upon the face of the commissioner's report, which is the basis of the decree, and not being susceptible of being repelled by extrinsic evidence, it will be corrected in the appellate court, though not excepted to in the court below. *Wills' adm'r, v. Dunn's adm'r*, 5 Grat. 384.

DECREES RESPECTING PARTITION AND BOUNDARIES.

*Decree appointing commissioners to assign and allot shares.
&c. (a)*

(Names of parties.)

This cause came on this day to be heard, &c. On consideration whereof, the court doth adjudge, order and decree that partition be made of the several pieces or parcels of land in the bill mentioned as follows, to wit: (here describe the respective shares to be assigned each party;) and for the purpose of effecting such partition, the court doth order that A. B., C. D., E. F., G. H. and R. K., who are hereby appointed commissioners for that purpose, (a) any three or more of whom may act, do assign and allot to the several persons before named the respective shares and proportions aforementioned by metes and bounds, and if, in their opinion, such partition of the real estate cannot be made in kind without loss or injury to the parties, then that the said commissioners report that fact to this court and the reasons upon which their opinion is founded with the real value of the estate, and the said commissioners are directed to report their proceeding to the court and any other matter deemed pertinent by themselves or required by the parties.

NOTES.

As to manner in which commissioners should proceed, see 2 Rob. Pr. 12, 13.

In case commissioners cannot divide the land in kind an order of sale will be entered, (see terms of order of sale *post*) and the court will distribute proceeds. In case one of the parties agree to take the whole land agreeably to the terms of the statute found in Code of Virginia, chap. 124, sec. 2, the terms of the decree may be readily adapted to such case.

Decree confirming commissioner's report [and directing conveyances.]

(Names of parties.)

This cause came on this day to be heard upon the papers formerly read, and the report of A. B., C. D., and E. F., three of the commissioners appointed by the decree entered herein on the — day of —, of the partition of the land in proceedings

(a) In the English practice, in Maryland and formerly in Virginia, it was usual to award commissions directed to three or more persons, specially named, any three or more of whom might make the partition. See Seton on Decrees, 184, *et seq.* Rob. Forms, *edit.* 1826, p. 189. Now, in Virginia, the entry appoints commissioners, &c.; a commission is not usually directed or issued.

mentioned among the several parties entitled thereto, agreeably to the terms of the said decree, and was argued by counsel. On consideration whereof, it appearing to the court, that in the partition made by the said commissioners, lot No. 1 embracing, &c., (here describe it,) fell to the share of plaintiff, R. M., lot No. 2, embracing, &c., (here describe it,) fell to the share of the defendant, C. M., and lot No. 3, embracing, &c., (here describe it,) fell to the share of the defendant, L. B., it is adjudged, ordered and decreed that the said report of the said commissioners be confirmed, and that the partition in manner and form aforesaid made, be held firm and stable. [And it is further ordered that mutual conveyances be executed by the parties to each other, of the several lots hereinbefore mentioned assigned and allotted to each of them as aforementioned.] (a) And the court doth further adjudge, order and decree that the plaintiff R. M. do pay unto the defendant C. M. the sum of thirty-five dollars, and unto the defendant L. B. the sum of forty-two dollars, these sums being respectively due from the said plaintiff to the said C. M. and L. B. as owelty of partition on the division aforementioned. And it is ordered that the costs of this suit be proportionably borne by the parties thereto, [and that the parties to this suit, plaintiff and defendants, do pay to A. B., C. D. and E. F., the commissioners aforesaid, each, the sum of ——— dollars, for their services in making the partition aforementioned.] (b)

(¹) *Decree directing commissioners to allot and apportion shares.*

W. J. F. plaintiff against P. B. J., administrator de bonis non of S. F. deceased, J. F., S. F., M. F. F., and A. E. F., infants under the age of twenty-one years by P. R. their guardian ad litem, assigned to defend them in this suit, defendants.

This cause came on this day to be heard upon the original and amended bills, taken for confessed as to the adult defendants, the

(a) By a partition made at law the legal estate is vested by the partition. But by a partition in equity, the equitable right only is vested; and to complete the partition, mutual conveyances must be executed by the parties. *Whaley v. Dawson*, 2 Sch. and Lefr. 372. *Miller v. Wormington*, 1 J. and W. 493, and judgment of Lord Hardwicke in *Tuskfield v. Buller*. It is better to direct the conveyances by the parties themselves if there be no legal impediment in the way. If parties be under some legal disability, and may not, therefore, execute proper conveyances, then a commissioner should be appointed to execute the same. The 4th sec. chap. 178 of the Code of Virginia gives to the courts of equity in Virginia full power to appoint a commissioner to execute any deed or writing, and declares that the execution of such deed or writing by a commissioner so appointed "shall be as valid to pass, release or extinguish the right, title and interest of the party on whose behalf it is executed, as if such party had been at the time capable in law of executing the same and had executed it."

(b) Commissioners appointed to divide lands under a decree of the court, allowed each five dollars per day. (*Ch. Taylor.*) *Cabell v. Cabell, et als.* 4 Hen. & Munf. 436.

answer of the infant defendants by P. R., their guardian ad litem, with replication thereto and was argued by the counsel for the plaintiff: On consideration whereof, the court doth order that B. P., S. B. L., T. J. W., W. D. J. and J. W. F., who are hereby appointed commissioners for the purpose, any three of whom may act, having been first duly sworn, do proceed to lay off and divide the real estate, of which S. F. died seized and possessed, consisting of ——— tracts of land in the county of ———, one near ——— in the county of ———, containing about ——— acres, adjoining the lands of S. B. S., J. W. F. and others, and the other near ——— in the said county, containing about ——— acres, and adjoining the lands of N. H. and others, into five equal parts, having regard to quality and quantity, and assign one of five said parts to each of the children of the said S. F. deceased, namely: to W. J. E. one fifth part, to J. F. one fifth part, to S. F. one fifth part, to M. F. F. one fifth part, and to A. E. F. one fifth part. But if the said commissioners should find it impracticable to divide the said land among the aforesaid parties, or should be of opinion that the interest of the said parties would be more promoted by a sale of the same, in such case they are required to report the facts upon which their opinion is based, to the court, and also what in their opinion, is the fee simple value of the whole of the real estate of which S. F. died seized and possessed: and in either case they are required to report their proceedings under this order to the court.

(2) *Commissioners having reported land indivisible in kind, report confirmed and sale ordered.*

W. J. F. plaintiff against P. B. J., administrator de bonis non of S. F. deceased, J. F., S. F., M. F. F., and A. E. F., infants under the age of twenty-one years by P. R. their guardian ad litem. assigned to defend them in this suit, *defendants*.

This cause came on this day to be again heard upon the papers formerly read and upon the report of S. B. L., W. D. J. and J. W. F., three of the commissioners under the decree of the ——— day of ——— eighteen hundred and ———, to which report there is no exception and was argued by the counsel for the plaintiff: On consideration whereof, the court doth approve and confirm the said report, and doth adjudge, order and decree that the Sheriff of ——— county, or one of his deputies, do proceed after having advertised the time, place and terms of sale in one or more of the newspapers published in the ———, once a week for twenty days, and also posted notice thereof at the door of the courthouse of ——— county, on some court day previous to the day of sale, to sell the real estate in the bill and proceedings mentioned, of which S. F. died seized and possessed, consisting of a tract of land of about ——— acres, near ———, one other tract of about ——— acres, near ——— in the county of ———, at public auction, in front of the door of the courthouse of the county of ———

on some court day, upon the following terms, to wit: one third cash, one third on a credit of twelve months, and the residue on a credit of two years from the day of sale, the credit instalments to bear interest from the day of sale; taking from the purchaser bonds with good personal security for the deferred payments, and the title to be retained until the further order of the court. And the said Sheriff, or such deputy as may act under this decree, is required to report his proceedings under the same to the court.

PRACTICAL NOTES ON DECREES FOR PARTITION, &c.

As to partition of lands, of slaves or other chattels, see Code of Virginia, chap. 124, sec. 1-6.

Partition.

If suit for a partition be instituted in the County or Corporation Court, and a sale of the real estate or part thereof be proper, and the dividend of any party in the opinion of the court exceed the value of *three hundred dollars*, the case, before any decree for sale therein, should be removed to the Circuit Court of the County or Corporation. See sec. 2 of chap. 124 Code of Virginia.

The only indispensable requisite entitling the plaintiff to relief in equity on bill for partition, is, that he should shew a clear legal title. Whenever this is shewn, the claim to partition is matter of right and not of discretion. *Wiseley v. Findlay and others*, 3 Rand. 361; *Castleman, &c. v. Veitch, &c.*, 3 Rand. 598; *Stuart's heirs v. Coalter*, 4 Rand. 74.

Where the legal title was disputed or doubtful, it was the practice, before the statute in Code of Virginia, above cited, for the court of equity either to dismiss the bill, as unfit for its jurisdiction, or retaining the bill to refuse relief until the plaintiff established his title at law, by ejectment or other legal remedy; (see II Rob. Pr. 11, and cases cited; *Straughan v. Wright*, 4 Rand. 493; *Stuart's heirs v. Coalter*, 4 Rand. 74. See also *Lange v. Jones*, 5 Leigh, 192;) but it seems that under the present statute the courts of equity in Virginia may in the exercise of its jurisdiction over cases of partition, "take cognizance of all questions of law affecting the legal title, that may arise in any proceeding." Code of Virginia, chap. 124, sec. 1. In cases of this kind, where the legal title is disputed as doubtful, courts of equity will probably under this statute, as in other cases where there is much doubt or difficulty concerning facts, direct an issue to be tried either at its own bar, or by another court. See note of revisors of Code to 4 sec. chap. 124, in their report, p. 64; also 10 Grat. 145.

As to issues see preceding volume, sections 241, 325-332.

[Bill in equity for partition of land held jointly by insolvent debtor and another, *Ruffners v. Lewis's ex'ors*, et als.; 7 Leigh 720. A tenant by the curtesy of lands purchases the reversionary interests of one of these heirs, another interest is held by infants; *held* that a court of equity will decree

partition of the land at the suit of the tenant by curtesy, (1845-) *Otley v. McAlpine's heirs*, 2 Grattan, 340.]

Two tenants in common, of full age and laboring under no disability make partition of a tract of land, by deed, according to an old survey. The parties enter into possession of the parts respectively, no fraud or misrepresentation averred—*held*, that such division, however unequal, is binding on them and their assigns. *Jones's devisees v. Carter*, 4 H. and M. 184.

A sale of a part of a tract of land having been made under a misconception of the rights of the parties, and the purchaser, with other plaintiffs, applying to a court of equity for a partition of the land, (saying nothing of the part sold,) among themselves and the vendors and others, to which partition they appeared entitled; and the vendors, by their answer, expressing a wish, that if partition should be decreed, the sale should be set aside; the court rescinded the sale, and directed a partition of the whole tract. *McClintic, &c. v. Manns*, 4 Munf. 328.

A partition, which has long been acquiesced in, and acted upon by the parties generally, ought not, on the ground of irregularity only, to be disturbed, even by a party who never acquiesced; but it may, if unjust or illegal. *Carter's ex'or v. Carter et als.*, 5 Munf. 108.

Under the circumstances of this case, one of the persons entitled to partition, having been in possession and enjoyment of the whole land for many years, through want of knowledge of the title of the other parties, to whom he made their title known immediately after it was discovered by himself; upon a bill filed by them for partition, it was considered equitable that he should account for their proportion of the rents received by him, deducting his disbursements for securing the title; that all the leases, and agreements for lease, he had made of the land, should be acquiesced in by the plaintiffs; and that, for a part which he had sold, he should pay the price received, with interest from the time of the sale; the time when he received it not appearing to be different from that of the sale. *Ibid.*

Interest, also, would have been allowed the other partners on their proportions of the rents received by him from the time of filing their bill; but, by their consent, it was allowed from the beginning of the next year after the last receipt. *Ibid.*

Boundaries.

As to origin of jurisdiction exercised by courts of equity in England over the settlement of boundaries, see 11 Rob. Pr. 163, 4; also 2 Meriv. 416, *Glynn v. Seawen*, Finch's Rep. 239; and as to whether these courts have jurisdiction over such cases *per se*, see *Wake v. Conyers*, 2 Cox's Ch. Ca. 360; *Waring v. Hotham*, 1 Brown's Ch. Rep. 40; *Atkins v. Hatton*, 2 Anst.

386. The weight of authority seems to be against the exercise of such jurisdiction by the English courts. "In Virginia," says Mr. Robinson in his Practice, "the Court of Appeals have often recognized the general rule that equity does not interfere in questions involving the title to real property." The jurisdiction respecting the boundaries of land, it has been declared, must be restricted to those cases in which some equity is raised by the acts of the parties; and this equity must be an equity of the plaintiff against the adversary claimants of the case. He cannot give the court jurisdiction by setting forth in his bill an equity against other persons. II Rob. Pr. 164, 5. See *Stuart's heirs v. Coalter*, 4 Rand. 74.

DECREE FOR FORECLOSURE OF MORTGAGES, &c.

Decree for foreclosure of mortgage and sale of property.

(Names of parties.)

This cause came on, &c On consideration whereof, the court doth adjudge, order and decree, that unless the defendant do, within six months from the date hereof, pay to the plaintiff the sum of \$300, with interest thereon, to be computed at the rate of six per centum per annum, from the first day of February, 1818, until payment, the said defendant, his heirs, and all persons claiming under him, be from thenceforth forever barred and foreclosed, of and from all equity of redemption in the lot No. 734, in the city of Richmond; and in case of default in the payment of the sum of money and the interest aforesaid, that A. B., who is hereby appointed a special commissioner for that purpose do, after having advertised the time and place of sale for three weeks successively, in one of the newspapers printed in said city, expose to sale on the premises, at public auction, to the highest bidder, the said lot of land, on the following terms, to wit: (here set forth terms,) (a) and out of the proceeds of sale, after defraying the expenses attending the same, do deposit the residue of the cash instalment of said purchase money aforesaid, in one of the banks in the city of ———, and file among the papers of this cause a certificate of such deposit, [and return with his report of his proceedings under this decree, the bonds given for credit instalments of said purchase money.] But the said A. B. is not to proceed to act under this decree as such commissioner until he shall have entered into bond with sufficient security in the clerk's office of this court, payable to the commonwealth of Virginia, conditioned, for the faithful discharge by him of his duties as such commissioner. (b) And the said commissioner is directed to report his proceedings under this decree to the court.

(a) See Code of Virginia, chap. 178, sec. 1.

(b) See Code of Virginia, chap. 178, sec. 1. It will be noticed that the condition of the bond is not *totidem verbis* prescribed by this chapter. See Code of Virginia, chapter 13, sec. 8, for condition of bond, &c.

NOTES.

The practice in Virginia differs from the English practice. In Virginia (and in most of the other States of the Union, 4 Kent. Com. 174) the court decrees a sale of the mortgaged premises. In England, the decree is, that the mortgagor be forever barred and foreclosed of his equity of redemption and that the mortgagor have the absolute right of property. See Seton's Forms 139 *et seq.*

In some cases, however, the courts of England have not adhered to the practice of simple foreclosure. Judge Lomax has classified these exceptions in the second volume of his Digest of the Laws of Real Property, p. 401 *et seq.*

Commissioners appointed by foregoing order report sale: sale confirmed and decree for conveyance.

(Names of parties.)

This cause came on this day to be further heard upon the papers formerly read, and the report of the sale made by the commissioners pursuant to the decretal order of the 17th day of January last, to which there is no exception, and was argued by counsel. On consideration whereof, the court approving and confirming the said report, doth adjudge, order and decree, that upon the payment by J. B., jun'r, of his two bonds in the report mentioned, as executed by him, for the purchase of the land and premises directed to be sold by said decretal order, the said commissioners do convey to the said J. B., jun'r, with special warranty, the said lands:

And it is further ordered, that when the said commissioner shall have received payment of the bonds, for \$1,587 73, mentioned in the said report, he shall forthwith deposit the same in the Farmers' Bank of Virginia, to the credit of the court in this cause and file among the papers of this court a certificate of such deposit. But the said A. B., comm'r, &c., (see p. 451, *ante.*)

NOTES.

When the commissioners have made a report of sale, the same will be confirmed if there be no objection, and if it appear that the purchase money has been paid, the same order may direct a conveyance to the purchaser. 1 Rob. Pr. 387. It has been questioned whether a deed to the purchaser at a sale directed by a decree conveys any title without a decree confirming the sale; Lovell v. Arnold, 2 Munf. 167, and whether it be regular in a decree of foreclosure, directing sale of mortgaged land, further to direct the proceeds to be paid over the plaintiff before the sale has been confirmed by the court. Anderson v. Davies, 6 Munf. 484. A more important question in relation to such sales is this—at what time the purchaser becomes the owner of the property sold, and suffers any losses (by fire or otherwise) which the property may sustain. Sir Edward Sugden lays it down as law that in sales before a master in the English courts, the purchaser is not considered as entitled to the benefit of his contract till the master's report of the purchaser's bidding is absolutely confirmed; 1. Sugden on Vendors, 39, and that the bidder not being considered as the purchaser until the report is confirmed is not liable to any loss by fire or otherwise which may happen to the estate in the interim; nor is he until the confirmation of the report compellable to complete his purchase; but upon the report being confirmed he will be

compelled to carry the contract into execution. 1 Sugden on Vendors, 4. The Virginia practice seems to accord with the doctrines announced by Sir Edward Sugden. See 1 Lom. Dig. R. P. 406; also Heywood v Covington, 4 Leigh, 373, in which Tucker P. held a purchaser absolved from his purchase, provided there was no fault in him; in a case where a sale, made of a mill and mill seat, and after the sale and before the confirmation of report, the mill and mill-dam were materially injured by freshets. See also Taylor v Cooper, 10 Leigh 317. After report confirmed, purchaser is considered owner from the date of sale. *Ibid.*

If when the sale has been made and the report confirmed, the purchaser fail to complete his purchase by paying the purchase money, an order may be entered directing the purchaser to make such payment by a specified time, or show cause why an attachment should not issue against him. 2 John. Ch. Rep. 695. See p. 158-9, *ante*, and process of contempt. (See Brasher's ex'rs v. Cortlant, 2 John. Ch. Rep. 505. Gordon v. Sims, 2 McCords Ch. Rep. 152, 162, 165.) See also Code of Virginia, chap. 178, sec. 2.

When a sale and conveyance are made under a decree foreclosing a mortgage, the court of chancery is not *functus officio* until the decree is executed by the delivery of possession. Green J. in Newman v. Chapman, 2 Rand. 93. If it appear that a person not a party to the suit is in possession of the property, and refuses to give it up, the usual course of the court (says Chancellor Taylor) is to make a rule upon such person, and unless he show a paramount right in himself to order the property to be delivered up; and enforce such order by attachment if necessary. Commonwealth v. Ragsdale, 2 H. & M. 8.

The crops which are growing upon the mortgaged land at the time of the sale under the decree of foreclosure pass with the land to the purchaser thereof. Crew v. Pendleton, &c. 1 Leigh 297. And it is the duty of the court in which the decree is made to protect the purchaser if he is disturbed in his possession of the crops by the general creditors of the mortgagor, before a legal title has been made to him by the officer of the court. *Ibid.*

When sales of lands under decrees will not be set aside. Fairfax v. Muse's ex'rs, 4 Munf. 124; Forde v. Heron, *Ibid.* 316.

Cases in which sales of lands under decrees have been set aside. Quarles v. Lacy, 4 Munf. 251. Wood's ex'r and Miller v. Hudson, 5 Munf. 423; because terms of decree were not followed by the marshal. Tennant's heirs v. Pattons, 6 Leigh 196.

See Code of Virginia, chapter 178, sec. 3, as to commissions of commissioners.

See Code of Virginia, chap. 178, sec. 8, as to effect on purchaser's title of setting aside order of sale when executed six months after its entry.

Decree for payment to plaintiff of proceeds of sale in satisfaction of his debt, and directing the defendant to check for the residue.

(Names of parties.)

This cause came on, &c. On consideration whereof, it appearing to the court by the certificate of deposit filed by A. B., (the special commissioner appointed to sell the mortgaged property in the proceedings mentioned) among the papers in this suit, that there is on deposit in the Farmers' Bank of Virginia, to

the credit of this suit, the sum of _____ dollars, the proceeds of said mortgaged property; and it further appearing that the plaintiff is entitled to the sum of _____ dollars, that being the amount of the debt secured by his mortgage with interest thereon, and of the costs by him about his suit in this behalf expended, the court doth adjudge, order and decree that the said plaintiff (or his counsel N.O.,) do check on an attested copy of this decree on the said bank for the said sum of _____ dollars. And it is further ordered that the defendant do check on the said bank on an attested copy of this decree for the sum of _____ dollars, being the balance standing in the said bank to the credit of the court in this cause after the said plaintiff has checked as aforesaid. [And leave is given the parties or either of them to procure attested copies of this decree from the clerk, forthwith.]

*Decree for account under bill for equity of redemption.
where mortgagee is in possession.*

(Names of parties.)

This cause came on, &c. On consideration whereof, the court doth adjudge, order and decree that it be referred to one of the commissioners of this court to take an account of what is due the defendant, Robinson, for principal and interest on the mortgage in the bill mentioned, after deducting whatever amount of the rents and profits of the said mortgaged premises, the said defendant, Robinson, may have received, or which may have come to the hands of any other person or persons by his order or for his use, or which he withouthis wilful default might have received. And the said commissioner is directed to examine, state and settle the said account and report the same to the court with any matter specially stated deemed pertinent by himself or required by any of the parties to be so stated.

NOTES.

See notes on accounts p. 437, *ante*. In the settlement of account directed by this decree of course, the commissioner will adopt that between debtor and creditor. See p. —, *ante*.

See Practical Notes on bills, &c., p. —, *ante*.

Decree, on return of commissioner's report requiring plaintiff to pay amount found due, and in default, a sale of mortgaged premises directed, &c.

(Names of parties.)

This cause coming on this day to be heard upon the papers formerly read and the report of commissioner _____ under the decree entered herein on the _____ day of _____, to which report

there was no exception, was argued by counsel. On consideration whereof, the court doth adjudge, order and decree that the plaintiff, J. B., do pay unto the defendant, Robinson, within six months after the date of this decree, the sum of \$——, with interest, &c., that being the balance found due from the said plaintiff to the defendant, Robinson, on the report of the said commissioner, [and the costs of the defendant expended in his defence in this suit,] and that upon the payment of the said principal, interest [and costs] (a) to the said Robinson, that the said defendant do re-surrender the mortgaged premises in the bill mentioned unto the said plaintiff, J. B., or unto such person or persons as he shall direct, free and clear of all incumbrances, done by him or any person claiming by, through or under him. [But in default of the said plaintiff paying unto the defendant, Robinson, the said principal, interest and costs as aforesaid, it is ordered that the said plaintiff be foreclosed of all equity of redemption in the said land and the court doth further adjudge, order and decree that in case of such default in the payment of said principal, interest and costs then that A. B., who is hereby appointed a commissioner for the purpose, do expose to sale at public auction, to the highest bidder, on the premises, the land mortgaged by the plaintiff, as in his bill mentioned, on the following terms, to wit: (here prescribe terms, &c.) (b) and the said commissioner is directed to report his proceedings under this decree to this court. But the said A. B. is not authorised to execute this decree until he shall, &c., (follow form on p. 451, *ante*, to conclusion.)

NOTES.

The foregoing form has been drawn in conformity with the decision in *Turner v. Turner*, 3 Munt. 66.

See notes to decrees on foreclosure, &c., on p. 452, *ante*, as to sales by commissioners and purchaser's rights and liabilities, commissions of commissioners, &c.

PRACTICAL NOTES ON DECREES FOR FORECLOSURE, &c.

See 2, 3, title *Decrees* on p. 262, *ante*; also 24, 25, 26, title *Decrees*, p. 265, *ante*; also 2 and 47 title *Parties*.

If a mortgagee in consequence of assurances that he shall receive his money from another quarter, permit the mortgagor to sell the premises, the

(a) It can not be questioned that in a case in which the defendant mortgagee has been guilty of no wrong, he should have costs. See *Turner v. Turner*, 3 Munt. 66.

(b) See notes on p. 452, and conclusion of form, p. 451, *ante*.

purchaser will be protected; notwithstanding the fund from which the mortgagee expected payment proves delusive. *Taylor v. Cole*, 4 Munf. 351.

C. takes a mortgage from A. to secure just debts, and is informed immediately before the mortgage is executed, that A. has mortgaged the same subject to B. to secure a debt due him, but that the debt to B. is usurious, which mortgage to B. is not duly recorded: *Held*, that C., and all claiming under the mortgage to him, are purchasers with notice of the prior unrecorded mortgage to B., and that the contemporary information that the prior mortgage was usurious, does not affect the question of notice of the prior mortgage. *Beverly v. Brooke et al.*, 2 Leigh, 426.

Where a foreclosure is decreed, the court is to exercise a sound discretion in relation to the period of redemption, and fix it according to the circumstances of the case. The usual time is six months, but less may be allowed. *Harkins v. Forsyth et al.*, 11 Leigh, 294.

A final decree of foreclosure in favor of the assignee of a mortgage ought to put to rest any controversy between the parties thereto, on the ground of any supposed defect in the deed of assignment. *Chapman v. Armistead*, 4 Munf. 382. (An action at law.)

If a purchaser of land subject to incumbrance by mortgage, apply to equity for relief against a judgment in ejectment, the decree ought not to be "that the injunction be dissolved, unless the complainant pay the sum to the mortgagee," but that the mortgaged premises be sold, unless, &c., and that out of the proceeds of the sale, the sum due be paid to the mortgagee, and the surplus, if any, to the complainant. *Davison v. Waite*, 2 Munf. 527.

Slaves may be redeemed, notwithstanding the mortgagee has been in possession more than five years; the general rule being, that redemption will be allowed within twenty years; but that period is not absolutely limited; for redemption is sometimes allowed upon equitable circumstances, after a much longer time; because the trust existing between the parties, prevents the act of limitations from applying; and a creditor can never be injured if he get his principal and interest; a debtor may, if deprived of his estate at, perhaps, half its value. *Ross v. Norvell*, 1 Wash. 14.

Equity of redemption.

A deed is made whereby, after reciting that F. the grantor hath sold to H. the grantee, for the sum of \$200, real and personal estate, it is witnessed that the grantor in consideration of that sum, conveys the same to the grantee, the deed concludes "it is agreed and fairly understood by and between the said F. and H. that in case the said H., or his heirs or assigns,

shall not be able to make the aforesaid \$200, out of the estate hereinbefore conveyed, that then the said F. shall refund the same to the said H., or his heirs, or assigns, with lawful interest thereon, from this date till paid, or such part of the said \$200, as the said H. shall not be able to realize as aforesaid." Under the authority of this deed the grantee sells and conveys, and his grantee sells and conveys. Ten years after the date of the first deed, the grantor in that deed files a bill in equity to redeem the estate conveyed, on paying whatever may be due of the \$200, with interest. The bill cannot be maintained. Allen J. dissenting. *Floyd v. Harrison, &c.*, 2 Rob. 161.

On a mortgagor's bill for an account of profits and a conveyance of the mortgaged premises; if he still be indebted on the mortgage, his equity of redemption ought to be allowed him; but the costs of the suit should be decreed against him. *Turner v. Turner*, 3 Munf. 66.

I. M. having the equitable title to a tract of land, sold it to I. P., and received of him part of the price; but finding some difficulty in getting the balance, he made another sale of the same land to I. H., upon condition that he would advance the balance and give I. P. six months to pay it to him, in which event I. P. was still to have the land; otherwise it was to belong to I. H. The contract so made was approved by I. P., who accordingly promised to pay the money to I. H., and soon after the contract, moved off the land, of which I. H. then took possession. This was adjudged to be a mortgage on the part of I. P.; and that a court of equity should allow him to redeem, notwithstanding he failed to pay the money within six months, he not having treated with I. H. for a sale of his title nor entered into any discussion with him concerning the adequacy of the sum alleged to have been intended as the price or consideration therefor; and the said land being so far more valuable than the said consideration, as to leave no doubt that the contract in question was intended to create a penalty or pledge to ensure the punctual payment of the money. *Pennington v. Hanby*, 4 Munf. 140.

If the person having the equitable title to a tract of land mortgage it and afterwards sue for a conveyance of the legal title, (the mortgagee being a party to the suit,) the court ought not to decree a conveyance without holding the land ultimately bound to satisfy the mortgage, and to be sold to raise the money due, with interest. *Ibid.*

DECREES RESPECTING INFANTS, INSANE PERSONS, &c.

Infants.

See p. 442, *ante*.

Orders on motion for additional security made by surety against a guardian.

(¹) T. E. E., *ex parte*.

Upon the petition of T., E. E. this day filed, setting forth

that he stands bound in this court as security for W. G., as guardian of his two infant children, R. K. G. and W. H. G., and that he apprehends himself to be in danger of suffering thereby, and praying the court for relief, it is ordered that the said W. G., being ten days previously served with a copy of this order, do appear before this court on the first day of the next term, and show cause, if any he can, why he should not be compelled to give a new bond as guardian aforesaid with other security, or have his powers and authority as guardian aforesaid revoked and annulled, pursuant to the eleventh section of chapter one hundred and thirty-two, of the Code of Virginia.

(²) T. E. E., *ex parte*.

The said T. E. E., by his counsel, this day again appeared in court, and W. G., guardian of his two infant children, R. K. G. and W. H. G., still failing to appear and answer the rule entered in this case on the twenty-eighth day of November, eighteen hundred and fifty; and it appearing to the court, by the certificate of the clerk, that the said W. G. has returned to the court no account of his transactions as guardian aforesaid, the court doth order that unless the said W. G. shall, on or before the first day of February next, execute a new bond, with sureties to be approved by the court, in the penalty of three thousand dollars, being the penalty of his present bond, then that his powers as guardian aforesaid, be and the same are hereby revoked and annulled as an act of this day; and the court will then proceed to make such further orders as shall seem to it proper.

(³) T. E. E., *ex parte*.

The said T. E. E., by his counsel, this day again appeared in court, and it appearing to the court that W. G., guardian of his two infant children, R. K. G. and W. H. G., was duly served with a copy of the order entered in this case, on the sixteenth day of January last, as appears by the affidavit of A. B. H., deputy sheriff for W. B. R., sheriff of the county of Henrico, and he not appearing, although solemnly called; and that the said W. G. has failed to execute the bond, required of him by the said order of the sixteenth day of January last, that order is made absolute, and his powers as guardian of R. K. G. and W. H. G., are declared to be revoked and annulled, as an act of that day. And the court doth further order that the said W. G. do render, before one of the commissioners of this court, an account of his transactions as guardian aforesaid, and that he do forthwith deliver to the sheriff of this county the property and money in his hands belonging to his wards; and that the said

sheriff do, on or before the fifteenth instant, report to the court the property and money received by him, in order to a further decree.

44. *Infants plaintiffs arrived at age, &c.*

It being suggested to the court, that since the institution of this suit, R. A. hath attained his full age, on motion of L. A., by counsel, it is ordered that his name as next friend be discontinued in the subsequent proceedings, and that this suit be hereafter prosecuted in the name of R. A. as plaintiff only.

INSANE PERSONS.

45. *Orders concerning insane persons, awarding commission, &c.*

(¹) L. A. H., *ex parte*.

On the motion of A. L. and M. B., who have filed their petition, alleging that L. A. H., of the city of Richmond, is of unsound mind, incapable of managing her own affairs and of making valid contracts, and that she is a lunatic, requiring the aid of this court, and praying that a commission may issue, in the nature of a commission of lunacy, to enquire into the state of the said L. A. H.'s mind, and that a proper committee may be appointed to take the custody of her person, and the management of her estate, and the said petition being supported by sundry affidavits filed, the court doth order that a commission returnable forthwith do issue to Dr. J. W., Dr. T. N., Dr. M. C. J. R. and S. S., commanding them, or any three or more of them, to examine the said L. A. H.; and by lawful inquest, taken before them, to ascertain and report to this court, whether the said L. A. H. be lunatic, or so unsound of mind as to be incapable of managing her own affairs and of making valid contracts; and if she be lunatic or of unsound mind as aforesaid, how long she hath continued in that state of mind.

And the court doth further order, that the sheriff of Henrico county, at such time and place as the commissioners aforesaid, or any three or more of them may require, do summon and cause to come before the said commissioners, twelve or more good and lawful men of his bailiwick, to make inquisition upon oath of and upon the premises, and that the inquest so taken under the seals of the jurors, be forthwith returned with the report of the said commissioners to this court.

(²) L. A. H., *ex parte*.

The commissioners, appointed by the order of the twenty-fourth day of the present month, having returned an inquest,

duly taken between them and twelve jurors, lawfully empannelled and charged before them, on the twenty-sixth day of the present month, whereby it appears that the said L. A. H. is now, and has been for fifteen years at least a lunatic without lucid intervals, so that she is not sufficient for the government of herself, and her lands, tenements, goods and chattels—the court on the motion of the petitioners, A. L. and M. B., doth adjudge and order, that until the further order of the court, the person of the said L. A. H. be committed to the said A. L. and M. B., who are hereby authorised and required to take such measures for the care and comfortable maintenance of the said L. A. H. as to them may seem meet, for the reasonable expenses whereof the court will make appropriation out of the fund of the said L. A. H. now under the control of the court.

And the court doth further order that the brothers and sisters of the said L. A. H., and the husbands of such of the sisters as are married, be summoned to appear here on the first day of the next term, directed by law to be holden for the trial of civil causes, to shew cause, if any they can, why the custody of the person of the said L. A. H., and the management of her property should not be finally committed to the said A. L. and M. B., or some other proper committee.

And one of the commissioners of this court is required, after due notice to the said A. L. and M. B., and the said brothers and sisters of the said L. A. H., and the husbands of the married sisters, to state and report to this court an account of all the estate, real and personal, belonging to the said L. A. H., and what persons, in the opinion of the said commissioner, would be the most suitable to whom to commit finally the care of the person and management of the property of the said L. A. H.

(³) L. A. H., *ex parte*.

The order made in this cause at the last term, having been duly served on such of the brothers and sisters of L. A. H., and on the husbands of the married sisters, as have known residences in this commonwealth, and notice having been given to the others, by the due publication of the said order for eight weeks, in one of the newspapers of this city; and the commissioner having made his report pursuant to said order, to which there is no exception, whereby it appears that the only estate of the said L. A. H. known to the said commissioner, consists of the second and third instalments of the purchase money of a tenement in the said report mentioned, amounting to the sum of seventeen hundred and thirty-three dollars and thirty-two cents, whereof one-half fell due on the fourth of November, of the present year, (1831,) and the other half will fall due on the fourth day of June, in the year eighteen hundred and thirty-five; and whereby it also appears, that the petitioners A. L. and M. B., are the most suitable persons to whom to commit the care and management

of the said L. A. H. and of her property. And the said A. L. and M. B. having made a report of their proceedings under the said order, showing that they have placed the said L. A. H. in the Friend's Asylum, for the recovery of insane persons, near the city of Philadelphia; that they have incurred in her removal and board an expense of one hundred and ninety-one dollars and fifty cents, and contracted to pay for her board, medical attendance and all other expenses, the sum of four dollars per week, to which report no exception has been taken, and no person appearing to contest the petition of the said A. L. and M. B., the court doth therefore adjudge, order and decree, that the said A. L. and M. B. be, and they are hereby appointed a committee, to whom the custody, care and management of the person and property of the said L. A. H. is committed, to be kept and managed according to law, until the said L. A. H. shall be restored to her understanding, and lawfully discharged from their custody. And the said A. L. and M. B. are hereby authorised to check on the Bank of Virginia for that instalment of the purchase money aforesaid, which fell due on the fourth day of November, one thousand eight hundred and thirty-four, and to collect, and if necessary to check on the said bank for the other instalment, when it shall fall due, and out of the moneys aforesaid, and the interest which may from time to time be received from them, they are authorised and required to pay such of the costs of the suit lately pending in this court, wherein J. F. R. was plaintiff, and the said L. A. H. was defendant, acting by her committee, the said A. L., as the said L. A. H., or her said committee is chargeable with, also the costs of this proceeding. And the said A. L. and M. B., are required to apply the residue of the moneys aforesaid, and of the interest which may be received therefrom, to defray the proper costs and charges of the support, maintenance and care of the said L. A. H.; subject, however, to the control and direction of this court, such as may be given them from time to time.

And the court doth refer the report of the said A. L. and M. B. to a commissioner of this court, who is required to examine the vouchers and other evidence in support thereof, and make report thereupon to the court.

And the court doth further order, that the said A. L. and M. B., from year to year, render before a commissioner of the court, an account of their receipts and disbursements, under the authority hereby conferred upon them, and that the commissioner make report thereupon to the court. But the effect of this decree is to be suspended till the said A. L. and M. B. shall enter into bond with good security, in the penalty of three thousand four hundred dollars, payable to the said L. A. H., her executors and administrators, and conditioned for the faithful discharge of their duties as committee of the said L. A. H., and that they will, well and truly collect, manage, disburse and account for the moneys and other estate of the said L. A. H., if any other there be within

this commonwealth known, or to become known to them, according to the authority conferred upon them by this decree, and shall file such bond with the clerk of this court.*

DECREES CONCERNING INJUNCTIONS, (Sec. 400, 412.)

Order of injunction restraining waste.

(Names of parties.)

On motion of the plaintiffs by counsel, and for good cause shewn, a writ of injunction is awarded them to injoin and restrain the defendant R. B., his agents and all others concerned, from committing waste upon the tract of land in the bill mentioned, whereof J. W. died seized, lying in the county of Henrico, and containing about ninety acres, and from cutting and removing anything from it until the further order of the court. But the plaintiffs are not to have the benefit of this order, until the adult plaintiff shall enter into bond, with sufficient security, in the clerk's office of this court, in the penalty of two hundred dollars, payable to the defendants, and conditioned to pay to them, or either of them, all such damages and costs as they or either of them may sustain in consequence of the said injunction, in case the same shall be dissolved.

Order for injunction to judgment.

(Names of parties.)

On motion of the plaintiff by counsel, and for good cause shewn, a writ of injunction is awarded him, to injoin the defendant S. L., his agents, attorneys and all others concerned, from further proceeding on a judgment recovered by that defendant against the plaintiff, in an action of detinue, in the Circuit Court for the county of Powhatan, until the further order of the court.

But the plaintiff is not to have the benefit of this order, until he shall enter into bond, with sufficient security, in the clerk's office of the said Circuit Court. &c., &c., in a penalty equal to double the amount of the said judgment, conditioned as the law requires; and until he shall also file with the clerk of the said court, a release of all errors at law in the said judgment and proceedings.

* These forms in regard to insane persons were drawn before the act found in Code of Virginia, chap. 85. That chapter provides for the appointment of committees of lunatics. If its provisions be followed, the orders in the appointment of a committee may be easily framed.

Order dissolving injunction and dismissing bill.

(Names of parties.)

This cause came on this day to be heard on the bill, answer of the defendant with replication thereto, and an exhibit filed with the bill, and was argued by counsel. On consideration whereof, the court doth adjudge, order and decree, that the injunction awarded the plaintiff on the first day of May, eighteen hundred and forty-seven, to injoin and restrain the defendant, his agents, attorneys, and all others, until the farther order of this court from proceeding, to enforce the judgment in the bill mentioned, as to the sum of fifty dollars thereof, which judgment was recovered by the defendant against the plaintiff in the Circuit Superior Court of Law and Chancery for the county of Henrico and city of Richmond, on the common law side, on the twenty-fourth day of June, eighteen hundred and forty-one, be dissolved; that the bill of the plaintiff be dismissed, and that he do pay to the said defendants his costs by him about his suit in this behalf expended.

Dismission of bill after dissolution of injunction.

(See sect. 411.)

(Names of parties.)

This being the ——— term since the dissolution of the injunction awarded the plaintiff to stay the execution of the judgment on the bill mentioned, and no cause being shewn for the continuance of the said bill, on the motion of the defendants, by their counsel, it is ordered that the same be dismissed, and that the plaintiffs pay to the defendants their costs by them about their defence in this behalf expended.*

Injunction perpetuated.

(Names of parties.)

This cause, in which the bill hath been taken for confessed against the defendant, came on this day to be heard on the bill and an exhibit, and was argued by counsel. On consideration whereof, the court doth adjudge, order and decree, that the injunction awarded the plaintiff the 27th day of September, 1823, to injoin the defendant from selling the slave Franklin, in the bill mentioned, under an execution sued out of the clerk's office of the Superior Court of Law for the county of G., in favor of the defendant, against J. P., security for R. D., be made perpetual; and that the defendant do pay to the plaintiff her costs by her about her suit in this behalf expended.

* It is the clerk's duty to enter this dismissal. See Code of Virginia chap. 179, sec. 14.

PRACTICAL NOTES TO DECREES CONCERNING INJUNCTIONS.

See "Practical Notes on Bills in Equity, &c., "Eden on Injunctions."

The Superior Courts of Chancery have power (upon general principles of equity,) to direct the venue to be changed, after issue joined in a county or inferior court, where it appears that strong prejudices existed against the defendant, which were unknown to him, until after such issue was joined, and that a fair and impartial trial could not be expected in the court in which the suit was depending. In such case a judgment is not requisite, to authorise the chancellor to grant the injunction. *Darmsdatt v. Wolfe*, 4 Hen. & Munf. 246.

If by an agreement under seal, between the vendor and the purchaser of a tract of land, it be covenanted, that if any part thereof should be recovered by law from the purchaser, the vendor will abate or refund in proportion; and that he will not bring suit upon the bond for the purchase money, until the quantity of land, which the purchaser is to get, be ascertained, provided the purchaser prosecute a suit for that purpose in a reasonable time; a court of equity will give relief by injunction against a premature suit on the bond, and if it appear that the purchaser prosecuted his suit in a reasonable time, and could not recover the land, the injunction will be perpetuated, the money paid refunded, the bond surrendered and cancelled, and the contract rescinded. *Bullitt's ex'ors v. Songster's adm'rs*, 3 Munf. 54.

When injunction granted.

Randolph v. Randolph and als. 3 Munf. 99. *Wilson and als. v. Butler and als.*, 3 Munf. 559. *Scott and wife v. Holliday and als.*, 5 Munf. 103. *Horner v. Marshall's adm'x* 5 Munf. 446. *Lewis's adm'r v. Wyatt*, 2 Rand. 114. *Harrison v. Sims*, 6 Rand. 506. *Crawford v. Thurmond and als.*, 3 Leigh, 85. *Miller v. Trueheart, &c.*, 4 Leigh, 569. *Sims v. Harrison and als.*, 4 Leigh, 346. *Keytons v. Bradfords*, 5 Leigh, 39. *Koger and als. v. Kane's adm'r and heirs*, 5 Leigh, 606. *Miller v. Argyle's ex'or and als.* 5 Leigh, 460. *Whitton's adm'r v. Terry*, 6 Leigh, 189. *Calloway v. Alexander, &c.*, 8 Leigh, 114. *Mason v. Nelson*, 11 Leigh, 227. *Clarke and als. v. Curtis*, 11 Leigh, 559. *Anderson's ex'ors v. Anderson*, 11 Leigh, 616. *Hickerson's adm'r v. Helm*, 2 Rob. 628. *Cabaness v. Matthews and als. v. 2 Grat.*, 325. *Roberts v. Jordan*, 3 Munf. 488. *Clarke v. Hardgrove, &c.*, 7 Grat., 399. *Watson v. Fletcher, &c.*, 7 Grat., 1. *Rust and als. v. Ware*, 6 Grat., 50. *Peatross v. McLaughlin*, 6 Grat., 64. *Vathier v. Lane*, 6 Grat., 246. *McClelland v. Kinnaird*, 6 Grat., 352.

On what terms injunction to judgment at law granted.

Warwick v. Norvell, 1 Leigh, 96. See practical notes to bills in equity, &c.

When injunction refused.

Ross v. Woodville and als., 4 Munf. 324. Poage v. Bells and als., 2 Rand. 586; (because plaintiff not a party to suit at law injunction to judgment refused. Jordan's adm'r v. Williams, 3 Rand., 501.) Rhodes v. Cousins, 6 Rand., 188; *sed vide* Code of Virginia, chap. 179, sec. 2. Norris v. Hume, 2 Leigh, 334. Miller v. Crews, 2 Leigh, 576. Overseers of the Poor v. Hart, 3 Leigh, 1. Long's ex'or, &c. v. Israel and als. 9 Leigh, 556. James River and Kanawha Company v. Anderson, &c., 12 Leigh, 278. Hudson v. Kline, 9 Grat., 379.

Security on granting injunction.

Error not to require security on granting injunction, save in case of executors, &c. Lomax v. Picot, 2 Rand. 247. New security required, (Ch. T.) Ross v. Pleasants and als., 1 H. and M., 1.

An injunction to remove obstructions, &c., ordered at hearing of the cause. Brooke v. Barton, 6 Munf. 306.

Dissolution of injunction.

On motion to dissolve injunction on bill alone, before answer, the bill will be taken as true. Peatross v. McLaughlin, 6 Grat. 64.

An injunction to a judgment at law not showing equity on its face, dissolved without answer, as improvidently granted. Slack v. Wood, 9 Grat. 40.

Pending a bill for an injunction to a judgment, and for a rescission of a contract for the purchase of land, on the ground of an incumbrance and defect of title, the vendor removes the incumbrance and procures the title. The injunction is properly dissolved, but without damages, and with costs to the plaintiff. Young's adm'r. and Bowyer v. McClung and als., 9 Grat., 336. But if vendee might have obtained relief by supplemental bill or petition in another pending suit, he shall not have costs. *Ibid.*

Perpetuation of injunction.

Trueheart v. Price, 2 Munf. 468.

DECREES CONCERNING HUSBAND AND WIFE. (See *ante*.)

Decree for divorce. [*A vinculo matrimonii, &c.*] See Code of Virginia, chap. 109.

(Names of parties.)

This cause, in which the plaintiff appears to have proceeded against the defendant, who is out of this commonwealth, in the mode prescribed by law against absent defendants, and she still failing to appear and answer, came on this day to be heard on the

bill, the exhibits filed and examinations of witnesses, and was argued by the counsel for the plaintiff: On consideration whereof the court, being of opinion that the charge of adultery against the defendant is fully proved, doth adjudge, order and decree, that the marriage heretofore solemnized between T. P. and J. M. P. be and the same is hereby dissolved, the said T. P. forever divorced from his wife, the said M. P., and all the right, title and interest of the said M. P. in or to the estate, real and personal, of the said T. P., shall henceforth cease and determine; and that the plaintiff recover from the defendant his costs by him expended in the prosecution of this suit. And nothing further remaining to be done in this suit, it is ordered that the same be removed from the docket; but leave is reserved to the parties to make application to the court for such further orders as are authorised by law.

Same in a cause in which Attorney General was made a party.

M. A. S., by W. W., her next friend, *plaintiff v. E. G. and S. S. B., defendants.*

This cause, in which the Attorney General of the Commonwealth has appeared to defend the same, on behalf of the Commonwealth, pursuant to law, the defendant E. G., not having entered his appearance, came on this day to be finally heard upon the bill and exhibits, and examination of witnesses, and upon proof of the publication of the order entered herein on the eighth day of January last, as thereby directed, and was argued by the counsel for the plaintiff, and by the Attorney General on behalf of the Commonwealth: On consideration whereof the court doth adjudge, order and decree, that the marriage heretofore had and solemnized between the defendant E. G. and the plaintiff M. A. G., formerly M. A. W., shall be and the same is hereby dissolved, and that the said M. A. be forever divorced from the said E. G.; and all right, title or interest of the said E. in or over the estate or person of the said M. A., whether the said estate be real or personal, shall henceforth forever cease and determine; and the said M. A. shall be at liberty to marry again, and shall be restored to the condition of a *feme sole*, with all other rights attaching to such condition. The court doth further adjudge, order and decree, that all the right, title and interest of the said M. A., in or to the estate of the said E., whether the estate be real or personal, shall henceforth cease and determine, (a) but the said E. shall not in consequence of this decree be at liberty to contract another lawful marriage during the lifetime of the said

(a) See Jennings and *als. v. Montague*, 2 Grat. 350.

M. A.; but the said E., from marrying again in the lifetime of the said M. A., shall be as fully and effectually restrained as if this decree of divorcement had never been made.

The court doth further adjudge, order and decree, that the female child of the marriage of the said E. and M. A. G. named —, shall remain in the care and custody, and under the control of the said M. A.; and all the lawful power and authority of the said E. over the person and estate of the said female child shall cease and determine during the lifetime of the said M., or until such time as this or some other court of competent jurisdiction shall order, or decree to the contrary. And the court doth further adjudge, order and decree, that the said E. provide, as far as in his power, for the due maintenance of the said female child, and liberty is reserved to the said M., or to the said child by her said mother, or next friend, to apply to this court for such further order touching the maintenance hereby directed for the said child as may be proper. And the court doth further adjudge, order and decree, that the said E. G. do pay to the plaintiff her costs expended in the prosecution of this suit, and that he do also pay to the commonwealth her costs in defending the same.

Decree for divorce and alimony. (See Code of Virginia, chap. 109, sec. 12.)

A. B. by N. C., her next friend, *plaintiff*, against R. B., *defendant*.

This cause came on, &c. On consideration whereof, the court doth adjudge, order and decree, that the marriage heretofore had and solemnized between the defendant R. B. and the plaintiff A. B., formerly A. K., shall be and the same is hereby dissolved, and that the said A. B. be forever divorced from the said R. B.; and the court doth further adjudge, order and decree, that the defendant do pay, annually, unto the said plaintiff the sum of \$—, in quarterly instalments, on the first days of January, &c. in each year, that sum, being in the opinion of the court, a sufficient maintenance and support for the said A. B. And the court doth further adjudge, order and decree, that the said A. B. do pay unto the plaintiff her costs expended in the prosecution of this suit.

NOTES.—See notes to next form.

Order for payment to plaintiff pending suit.

J. N., a married woman, who sues by her next friend, M. L., *plaintiff*, against C. N., *defendant*.

On motion of the plaintiff, by counsel, and it appearing to the court from the pleadings and proofs in this cause, that the plain-

tiff has no means of support during the pendency of this suit, or of prosecuting the same, it is ordered that the said C. N. do pay unto the said J. N., annually, \$—, in quarterly instalments, on the first days of —, in each year, that sum being in the opinion of the court a reasonable allowance to the said plaintiff, taking into consideration the value of the defendant's estate.

NOTES.—A similar order may be made in the case of infants for their maintenance and education, when there are funds within the control of court to which infants are indisputably entitled. See 11 Rob., p. 346; 3 John. Ch. Rep. 1.

In *Purcell v Purcell*, 4 H. & M., 507, the court ordered the payment of twenty-five dollars quarterly to the plaintiff, to be applied towards her support and maintenance pending the suit, unless the defendant should show cause to the contrary by a given day.

The foregoing forms apply exclusively to suits for divorce. In addition to these the following notes are subjoined, referring to other subjects :

PRACTICAL NOTES.

See Code of Virginia, chap. 108, 109, 110.

As to what property of wife deemed personal estate, see *Fletcher v Ashburner*, 1 Bro. C. C. 497; *Ashby v Palmer*, 1 Meriv. 300, 3 Leigh, 255; *Pratt v Taliaferro*, 3 Leigh, 419; 2 Grat., 280; *Reading v Blackwell*, Baldwin's C. C. R., 175. See also *Dade v Alexander*, 1 Wash., 30; *Commonwealth v Martin's ex'or, &c.*, 5 Munf., 117; *Tazewell, &c. v Smith's adm'r*, 1 Rand. 313; *Evans, &c. v Kingsbury, &c.*, 2 Rand. 120; *Turner v Street*, 2 Rand., 130; 5 Leigh, 442; 7 Leigh, 366; 10 Leigh, 536.

As to effect of marriage on contracts between a man and a woman entered into before marriage. See 1 Tuck. Com., 110, and cases cited. 2 P. Wms., 243; 2 Vern. 480, 1; 2 Atk., 97; Prec. Ch. 41; Dick. 140; 2 Vent., 343; Vern. 409, 3 Leigh, 255. When wife charges her separate estate with payment of husband's debts, equity will decree the husband's assets to be applied in exoneration of her estate, or in repayment of the money advanced. 2 Vern., 347, 689; 1 Bro. P. C. 1; 2 Vern., 604; 1 P. Wms., 264; 2 Atk. 384; Fonb. Eq., 102, 3; Story's Eq.

When conveyance of separate estate to a married woman a fraud on marital rights of husband. 1 Tuck. Com., 113. For other cases of fraud upon marital rights of husband, see *Macqueen on Husband and Wife*, p. 35; *Crane v Morris's lessee*, 6 Peters, 598; 4 Wash. C. C. R., 224; 2 Leigh, 11.

With respect to contracts between husband and wife subsequent to marriage. 1 Tuck. Com., 111; Co. Litt. 112, a, 187, b.; 1 P. Wms. 126; 2 P. Wms. 79, 316; 3 P. Wms., 334, 339; 1 Atk., 270; 3 Atk., 399; 1 Vern., 245;

1 Atk., 270; 2 Ves. 666; 1 Fon., 103; 6 Munf., 1; 10 Ves., 139; 7 John C. R., 57; 5 John C. R. 431. See Code of Virginia, chap. 118, sec. 2; also sec. 4; see 2 Brock. C. C. R., 285.

When court of equity will make provision for wife out of her property, see 1 Rand. 372; 11 Rob. Pr. 150, and cases cited. 2 John Ch. Rep. 206; 6 John Ch. Rep., 33; 5 John Ch. Rep., 464; but see 2 Grat. 98. When it will protect her property from injurious effects arising from acts or admissions of husband, 4 Rand. 397.

Cases of alimony; see *ante*, p. 467; also 4 Rand., 667; 1 John Ch. Rep., 364.

See also Seton on Decrees, 255, *et seq.*, for decrees respecting *femes covert* and practical notes.

For notes on *Dower*, see p. 368. Also *Herbert v Wren*, 7 Cranch., 370; 2 Brock. C. C. R., 256.

As to other rights of wife, see 2 Munf., 421; 5 Munf., 42; 1 Rand., 355; 2 Leigh, 183; 9 Leigh, 200; 12 Leigh, 512; 2 Rob. 340.

DECREES RESPECTING WILLS.

A decree construing will.

P. & als., plaintiff v R. & als., defendants.

This day came the plaintiffs by their counsel and filed their bill, and the defendants appeared by counsel and filed their answers, to which the plaintiffs by counsel replies generally. Whereupon, this cause being docketed by consent of parties by counsel, the same came on to be heard by like consent on the bill, answers with replications and exhibits filed, and was argued by counsel. On consideration whereof, the court is of opinion, and doth adjudge and decree, that according to the true construction of the will of J. D. M., deceased, the trustees thereby contemplated for the benefit of his grand-daughters, have power from time to time to change the investment of the trust subject, that the sum mentioned in the bill of nineteen hundred and eighty-nine dollars and ninety-three cents, with legal interest thereon from the first day of December, eighteen hundred and forty-seven, is a part of that trust subject, if the complainants J. B. M. and D. M., had been duly appointed trustees for the benefit of S. M., as well as the other grand-daughters of the testator, they might lawfully require payment of the same from the defendant, and he would not be bound to supervise their acts, or see to the application of the trust fund, or incur any danger from such payment, other than that (if any) which may arise from the accident of the loss of the bond. Wherefore the court doth adjudge, order and decree, as follows:

First. That the said J. B. M. and D. M., be and they are hereby appointed joint trustees for the said S. M., jointly with the other grand-daughters of the said J. D. M., deceased, under his will, and that they be and are hereby invested with all the power, authority and discretion which the said will would have conferred on them had they been expressly named as trustees in the said will. And that all their actings and doings, assuming to act as trustees for the said S. jointly with the other grand-daughters aforesaid, so far as the same have been within the limits of their authority as such trustees, for such other grand-daughters do stand approved and confirmed in the same manner, and to the same extent, as if they had been previously appointed trustees for the said S. M., by a court of competent jurisdiction, and in a proceeding to which she was a party; and that the said trustees be and they are hereby required before proceeding to execute said trust to enter into bond in the clerk's office of this court, with good and sufficient security, in the penalty of nine thousand dollars, payable to the commonwealth of Virginia, and conditioned that they will faithfully perform and fulfil their duties as trustees as aforesaid for all the said grand-daughters of the said J. D. M., deceased.

Second. That the defendant C. R., do pay into the Bank of Virginia, to the credit of this cause, subject to the order of this court, the said sum of nineteen hundred and eighty-nine dollars and ninety-three cents, with legal interest thereon from the said first day of December, eighteen hundred and forty-seven, until such payment.

Third. That the complainant D. M., and the defendant H. W. M., do execute a deed of release, referring to this decree, and releasing and reconveying unto the said defendant C. R., the property conveyed by the deed, made the thirty-first day of May, eighteen hundred and forty-two, and admitted to record in the office of the court of hustings for the city of Richmond, on the first day of June, eighteen hundred and forty-two, between the said C. R. and M. S., his wife of the first part, D. M. and H. W. M. of the second part, and J. D. M. of the third part, and acknowledge said deed, so that it may be duly admitted to record; and when said deed shall be delivered to the said R., or to the clerk of this court for him, and the fact of such delivery certified, by whichever of them shall receive the same, upon an official copy of this decree, then that the said J. B. M. and D. M. as trustees for the grand-daughters of the said J. D. M., deceased, be and they are hereby authorised to check on the Bank of Virginia, on an attested copy of this decree for the money above directed, to be deposited therein to the credit of this cause.

Fourth. That the parties respectively have leave to apply hereafter to this court for any other, or further order that may be necessary to carry out and fulfil the foregoing decree; and that

the said parties, who are adults, respectively pay their own costs of this suit.

Practical notes to decrees concerning wills.

See Code of Virginia, chap. 122. Jarman on Wills.

DECREES FOR SPECIFIC PERFORMANCE.

A. M., plaintiff, against C. D., defendant.

This cause came on, &c. On consideration whereof, the court doth adjudge, order and decree, that upon the payment of the sum of five hundred dollars by the said A. M., plaintiff, (without interest,) (a) to the said C. D., defendant, the said C. D. do execute a good and sufficient grant and conveyance to the said A. M., with general warranty and the usual covenants of title, granting and conveying to the said A. M. the land in the bill mentioned, according to the metes and bounds laid down in the agreement in writing between the said A. M. and C. D., bearing date on the — day of —, and filed as an exhibit with the plaintiff's bill. And it is ordered that the said defendant do pay unto the plaintiff his costs by him about his suit in this behalf expended. And leave is given the said plaintiff to apply to this court for such other relief in the premises as may be necessary.

NOTE.—Sometimes a commissioner is appointed to execute the deed, and the party is ordered to unite in it, and directed to give such a warranty as the terms of the contract of sale implied.

In the following case, the chancellor ordered the contract to be specifically performed, and the seller to abate a part of the purchase money :

Another decree for specific performance.

J. P., plaintiff, against B. P., defendant.

This cause came on this day to be heard on the bill, answer with replication thereto, the exhibits filed, and examinations of witnesses, and was argued by counsel : On consideration whereof, it appearing to the court that B. P. did, on the second day of December, eighteen hundred and fifty-four, purchase from J. P. a tract of land in the county of Henrico, estimated to contain sixty acres, but which upon re-survey appears to have actually contained sixty-two and a half acres, at and for the price of five hundred dollars, and immediately took possession thereof, and

(a) Of course it will depend upon the special circumstances of each case whether interest will or will not be allowed. If interest be proper, state the time at which it will commence.

exercised various acts of ownership thereon, and has paid no portion of the purchase money therefor. It further appears that although the actual quantity seems to exceed that estimated by the parties, yet there may very probably be a difference not less than one-fourth of an acre, nor more than four acres, upon the highest estimate that can be made consistently with the evidence, between the lines run by the surveyor and those previously pointed out to the defendant, according to which he alleges he alone agreed to purchase; and it may upon the evidence be true that such was his understanding, and although this difference is too slight, after the long continued possession of the defendant, subsequent to his knowledge of the fact, and in view of the other circumstances of the case, to authorise a re-scission of the contract, yet in the opinion of the court it may be just to compensate the defendant for this deficiency, which may easily and properly be done, by an abatement *pro tanto* of the purchase money. And no other ground of defence being sufficiently established by the proofs, nor any reliance by way of plea, or answer specially placed on the statute of frauds and perjuries, which, however, had it been specially pleaded, the court would have considered as no sufficient bar, under the circumstances of the case, to the specific performance sought by the plaintiff; and neither party having asked for a reference of the title, or reserving of the quantity of land, so as to ascertain more precisely the real difference in quantity between the lines said to have been pointed out to the defendant and those contained in the plat of the survey. the court, taking into view all the circumstances of the case, is of opinion that the contract between the parties should be specifically performed, and therefore doth adjudge, order and decree, that upon the tender by the plaintiff of the deed filed in this cause, if the same be approved by the defendant's counsel, or if not upon the tender of a good and sufficient deed, with general warranty by J. O. S., who is hereby appointed a special commissioner for the purpose, for the tract of land in the proceeding mentioned, contracted to be sold by the plaintiff to the defendant, the said defendant do pay to the plaintiff the sum of four hundred and fifty dollars, with legal interest thereon, from the second day of December, eighteen hundred and forty-four, until paid: and unless the said sum be paid by the said defendant, or some one for him, with interest as aforesaid, within six months from the date of this decree, then the sheriff of the county of Henrico, or one of his deputies, who is hereby appointed a commissioner for the purpose, proceed to sell the tract of land aforesaid, at public auction, on the premises, to the highest bidder, for cash, as to so much of the purchase money as will be sufficient to satisfy this decree, and upon such credit as to the residue as the defendant may direct, or as the said commissioner may deem judicious; and out of the cash proceeds of sale, the said sheriff is directed to pay to the plaintiff the principal and interest hereby decreed. And the said commissioner is directed to make report of any pro-

ceedings by him hereunder to the court. And unless the parties shall agree among themselves upon the amount to be allowed for the alleged difference of quantity, between the lines said to have been pointed out to the defendant and those pursued by the surveyor, then either party, upon notice, may cause the said tract to be again surveyed, to ascertain the said quantity, in which case the surveyor is to return a report and plat of the said survey to the court.

And the court doth adjudge, order and decree, that the defendant do pay unto the plaintiff the costs by him expended in the prosecution of this suit.

Decree in a case in which assignee for value of note given for purchase of land, brought suit against his assignor, the vendor and the vendee, for a specific performance of contract.(a)

This cause came on, &c. On consideration whereof, the court doth adjudge, order and decree, that the plaintiff recover of the said Q. B. W. the sum of \$154 34, with interest thereon from the 5th day of November, 1838, until paid, and his costs by him about the prosecution of his suit in this behalf expended; and upon the payment of said debt, interest and costs, it is further ordered that the clerk do deliver to the said Q. B. W. the original deed filed, as an exhibit with the bill, retaining a certified copy thereof, to be filed with the papers in the cause. And it is further adjudged, ordered and decree, that unless the said Q. B. W. shall pay to the plaintiff the debt, interest and costs aforesaid, within sixty days after the entering of this decree, the sheriff of G—— county, after advertising the time and place of sale by advertisement published, &c., and posted, &c., for four weeks successively, do proceed before the court-house of said county, on some court day, to sell said land in said deed described, upon a credit of six and twelve months, taking from the purchaser bond and security, and retaining a lien on the land for the security of the purchase money, and report his proceedings in order to a final decree.

(a) *Hanna v Wilson*, 3 Grat. 246. In this case the vendor retained the title to the land as a security for the purchase money. The vendor subsequent to sale assigned for value a note given for purchase money. The Court of Appeals of Virginia, held that the assignee of the vendor might maintain a suit for specific performance against his assignor and the vendor, and directed the decree to be entered, a copy of which is found above.

PRACTICAL NOTES TO DECREES FOR SPECIFIC PERFORMANCE.

See "Practical Notes to Bills in Equity, &c."

When refused.

Ward v Webber & als., 1 Wash. 279; Smallwood v Mercer and Hansborough 1 Wash. 290; Graham v Call, 5 Munf. 396; Graham v Hendren, 5 Munf. 185; Harvie & als. v Banks, 1 Rand. 408; Darlington v McCoolle, 1 Leigh, 36; Reed's heirs v Vannorsdale & ux., 2 Leigh, 569; Watts & als. v Kenney & ux., 3 Leigh, 272; Payne v Graves, 5 Leigh, 561; Moore's adm'r's v Fitz Randolph & als., 6 Leigh, 175; Pigg v Corder, 12 Leigh, 69; McCann v Jones, 1 Rob. 256; Bowles v Woodson, 6 Grat. 78.

When compelled.

White v Atkinson, 2 Wash. 94; Long v Colston, 1 H. & M. 111; Hook v Ross, 4 M. 97; Beverley v Lawson's heirs, 3 Munf. 317; Birchett & als. v Bolling, 5 Munf. 442; Wilde, &c. v Fox, &c., 1 Rand. 164; Evans v Kingsberry & wife, 2 Rand. 120; Anthony v Leftwich's representatives, 3 Rand. 238; Tapp v Beverley, 1 Leigh, 80; Edwards v Van Bibber, 1 Leigh, 231; Foley v McKeown, 4 Leigh, 627; Williams v Lewis, 5 Leigh, 686; Smith v Jones, 7 Leigh, 165; Clarke & als. v Curtis, 11 Leigh, 559; Hanna v Wilson, 3 Grat. 243.

There should not be a decree to pay money, absolutely on bill for specific performance, but court may give defendant election either to pay the money or to perform the agreement specifically. Hook v Ross, H. & M. 300.

When deficiency in land sold.

See Jolliffe v Hite, 1 Call, 301; Anthony v Oldacre, 4 Call 489; Quesnel v Woodlief, 6 Call, 218; Nelson v Matthews, 2 H. & M. 164; Hull v Cunningham's ex'or, 1 Munf. 330; Humphrey's adm'r v McClenahan's adm'r & heirs, 1 Munf. 493; Grantland v Wight, 2 Munf. 179; Nelson v Carrington ex'or, 4 Munf. 332; Fleet v Hawkins, 6 Munf. 188; Tucker v Coeke, 2 Rand. 51; Castleman & als. v Veitch & 'als., 3 Rand. 598; Bedford v Hickman, 5 Call, 236; Koger & als. v Kane's adm'r and heirs, 5 Leigh, 606; Keytons v Brawfords, 5 Leigh, 39; Neal v Logan, 1 Grat. 14.

X.

MISCELLANEOUS ORDERS AND DECREES IN THE VIRGINIA STATE COURTS.

1. *Order removing cause from county or corporation court.*

(Code of Virginia, chap. 169, sec. 4. See also *Triplett v. Tyler*, 4 H. & M. 413.)

K. M., *plaintiff*, against R. K., *defendant*, on motion for a writ of certiorari, &c.

On motion of K. M., it appearing to the court that R. K. has had due notice of this motion, it is ordered that a writ of certiorari be awarded him to remove hither a suit in equity, depending in the county (or corporation) court of — county, between the said R. K., plaintiff, and the said K. M., defendant, returnable here to the — day of this (or the next) term.

NOTE.—Writ may be awarded on petition in vacation. See Code of Virginia, chap. 169, sec. 4. An appellate court may award a writ of certiorari. See Code of Virginia, chap. 182, sec. 1.

It was the practice formerly to require a bond, when a writ of certiorari was awarded to remove a suit or action at law. Rob. Forms, edit. 1826, p. 90. Quære: as to the propriety at this time of requiring bond with security in such cases.

2. *Order made to county or corporation court removing cause from a county or corporation court to a circuit court.*

See Code of Virginia, chap. 174, sec. 1; also sec. 6.

A. B., *plaintiff*, against O. D., *defendant*.

It appearing that this suit has remained pending in this court more than one year, it is ordered that the same be removed to the circuit court for this county.

3. *Order for remove of suit from county or corporation court, after notice, by a circuit court.*

See Code of Virginia, chap. 174, sec. 2; also sec. 5.

A. B., *plaintiff*, against C. D., *defendant*.

On the motion of A. B., plaintiff in a suit in equity instituted in the — court of —, against C. D., it appearing that the said C. D. has had twenty days previous notice of this motion, it

is ordered that the said suit be removed from the — court of this county, (or corporation,) to this court.

NOTE.—Does not this power of removal supply the place of a certiorari, as contained in form No. 1, preceding, when that order is entered in court?

4. *Order for removal from one circuit court to another, or to a court of the county or corporation.*

See Code of Virginia, chap. 174, sec. 3; also sec. 5.

A. B., *plaintiff*, against C. D., *defendant*.

On motion of O. D., the plaintiff A. B., having had due notice of this motion, it is ordered that the said suit be removed to the — court of the county (or corporation) of —, [or, *when not on motion of party, as follows*: The judge of this court being so situated as to render it improper in his judgment for him to decide this suit, it is ordered, &c. as before.]

5. *Order changing plaintiffs to make them witnesses.*

See Galt, &c. v. Carter, 6 Munf. 245.

A. B. and L. M., *plaintiffs*, against C. D., *defendant*.

The powers of L. M., as trustee in a deed, &c., having been revoked, and M. N. having been substituted in his stead as such trustee, it is ordered that this suit be discontinued in the name of the said L. M., as one of the plaintiffs therein, and be proceeded in the name of the said M. N., as one of the plaintiffs therein; and the said M. N., and the plaintiff A. B., are required to pay into the court the costs which have been incurred by the defendant C. D., about his defence to this suit, and to enter into bond, with sufficient security, payable to the said defendant, conditioned* to pay him all costs which may hereafter accrue to the said defendant.

NOTE.—If injunction case, see Galt, &c. v. Carter, above cited, for further order.

See section 200 of preceding volume as to order, when party desires to have a plaintiff's name struck out, in order to have him examined as a witness. In such case the plaintiff has a right to strike his name out, and to make him a defendant by amendment, though without the consent of defendant, if the co-plaintiff "give security for the costs already incurred." 2 Dan'l Ch. Prac. 449.

The rule which prohibits a defendant from examining the plaintiff as witness, without his consent, does not extend to prevent his so examining a *prochein amy*, because otherwise the plaintiff, by making a material witness a *prochein amy*, might rob the other side of the benefit of his testimony; and accordingly when a defendant had obtained an order at the rolls, for liberty to examine a plaintiff, and also a *prochein amy*, as witnesses in the cause, upon a motion being made to discharge the order, it was only discharged as to the plaintiff, and not as to the *prochein amy*. Dan'l Ch. Pr., Vol. II., p. 267.

6. *Order by county court for removal of partition suit, where the dividend of a party exceeds the value of three hundred dollars.*

Code of Virginia, chap. 124, sec. 2.

A. M. and G. L., *plaintiffs*, against B. C., D. R. and M. N., *defendants*.

In the opinion of the court, the distributive share of the defendant M. N. in the land in the proceedings mentioned, is of greater amount or value than the sum of three hundred dollars, and it is therefore ordered, that this suit be removed to the circuit court of this county, (or city, or town.)

7. An order for removal of a report of fiduciary accounts from county or corporation court to a circuit court, may be made. Code of Virginia, chap. 133, sec. 33.

8. An order may be made directing pending case to be struck from docket, where there has been no order or proceeding for more than seven years, but to continue it, when in the discretion of the court it is proper. Code of Virginia, chap. 173, sec. 7.

9. *Order appointing guardian ad litem to infant or insane defendants.*

Code of Virginia, chap. 122, sec. 30; chap. 171, sec. 16; chap. 176.

A. B., *plaintiff*, against W. B. and N. O., *defendants*.

On the motion of —, D. L. is assigned as guardian ad litem to the infant defendant N. O., to defend his interests in this suit. (a)

10. Order compelling plaintiff to make election whether he will proceed at law or in equity. See *Gibbs v. Perkinson*, 4 H. & M. 415.

11. *Rule to speed.*

A. B., *plaintiff*, against C. D. and other, *defendants*.

The plaintiff in this cause having failed to prosecute his suit by maturing his cause for a hearing as against the defendants

(a) The court may compel the guardian ad litem to act, but he will not be liable for costs, and will be allowed his reasonable costs, which the party on whose motion he was appointed will be compelled to pay. Code of Virginia, ch. 171, sec. 16. See 2 Call, 1; 2 Munf. 129, 342; 4 Munf. 439; 2 Rand. 174, 409; 6 Munf. 99.

R. K. and others, on the motion of the defendant C. D., by counsel, it is ordered that unless the plaintiff proceed by proper process to mature this cause for a hearing, at or before the term next after he shall have been served with a copy of this order, the bill of the said plaintiff be dismissed at his costs.

12. *Defendants death suggested and rule to speed the cause.*

(Names of parties.)

On the motion of the defendant H. K., late sheriff of the county of Hanover, and as such administrator of W. J., deceased, by counsel, the deaths of the defendants, T. G., administrator of J. M. S., deceased, and B. B., executor of B. O., deceased, are suggested: And on the further motion of the said defendant, by counsel, it is ordered that unless the plaintiffs proceed by proper process to revive and mature this cause for hearing, at or before the term next after they shall have been served with a copy of this order, the bill of the said plaintiffs be dismissed at their costs.

13. *Order dismissing suit, plaintiff failing to mature his suit for a hearing.*

A. B., *plaintiff*, against C. D., and others, *defendants*.

The plaintiff in this cause having been duly served with a copy of the order entered herein on the — day of —, he still failing to mature this suit to a hearing against the defendants R. K. and others, on the motion of defendant C. D., by counsel, it is ordered that the same be dismissed, and that the plaintiff pay unto the defendant C. D., his costs by him about his defence in this behalf expended.

14. *Order for payment of money to plaintiff pending suit.*

[This is sometimes ordered in the case of a married woman (suing for a divorce, or alimony,) for the support of the plaintiff, and to enable her to prosecute the suit. II. Rob. Pr. 346. So, also, in the case of an infant. Ibid. 3 John Ch. Rep. 1. And in other cases, 1 Hopkins Ch. Rep. 274, 507.]

15. *Order for party to pay money into court.*

[There are many cases in which such an order should be made. When defendant in his answer admits a sum of money to be in his hands belonging to plaintiff. 3 Bro. C. C. 365; 1 New. Ch. 202; the purchaser of an estate when he has under an agree-

ment, taken possession of the estate without any engagement on the part of the vendor that he should not be called on to pay the purchase money until a good title can be made, will be ordered to pay the purchase money into court. 15 Ves. 317; 1 New. Ch. Pr. 203. And in many other cases a like order will be made. See New. Ch. Pr. 203.]

16. *Order to lend out money or invest in stock, &c.*

[For this purpose a commissioner is usually appointed, who should be required to give security agreeably to the provisions of the Code of Virginia, chap. 178, sec. 1. When money standing to the credit of a cause is lent out, it is usual to require *real* security, and in some cases both real and personal security is required. The terms of the loan are usually upon the condition that the borrower return the amount of money within sixty days, after he has been required to do so by an order or decree of the court.]

17. *Order changing next friend to make him a witness.*
(See 1 Rand. 153.)

G. H., an infant, under the age of twenty-one years, who sues by M. N., his next friend, *plaintiff*, against L. K. and N. R., *defendants*.

The defendants desiring to examine as a witness in this cause on their behalf, the said M. N., who is the next friend of the infant plaintiff, and it appearing by an affidavit filed by the said defendants that the testimony of the said M. N. is material to their defence to this suit, it is ordered that the name of the said M. N. be struck out of the record as next friend, and that J. B. be substituted as the next friend of the said infant, to prosecute this suit in his behalf.

NOTES.—See Mitf. Pl. 25, et seq. In the foregoing order the next friend is struck out, because of the general rule in equity that a plaintiff cannot be examined as a witness. See sec. 200, *ante*. *Quære*: Does not this general rule admit of exception in the case of a next friend plaintiff? Daniel thinks this case should be excepted from the operation of the rule; otherwise, says that writer, a party by making a material witness a *next friend*, might rob the other side of the benefit of his testimony. 11 Dan. Ch. Pr. 450; that writer cites a decision to that effect. Bird v Owen, Mos. 312. The reason cited by Daniel is unsatisfactory, because the defendant may secure the testimony by having the name of next friend struck out of the record—but should he be put to the inconvenience of delay and the costs of this procedure?

See Judge Roane's opinion in Burwell & als. v Corbin & als., 1 Rand. 150, on doctrines concerning next friend, his responsibilities, &c. See also Hite's ex'or v Hite's legatees, 2 Rand. 409.

18. *Order allowing creditor to prefer his claim.*(a)

A. B., who sues, &c., *plaintiff*, against R. M: adm'r, & als., *defendants*.

This day, C. N., presented his petition to the court, praying to be admitted a party plaintiff in this suit, and agreeing to contribute to the expense of this suit and it is accordingly ordered that the said C. N. be admitted as a party plaintiff, and that he contribute towards defraying the expenses of this suit.

19. *Rule for security for costs by clerk.* Code of Virginia, chap 185, sec. 2.

A. B., *plaintiff*, against C. D., *defendant*.

The plaintiff in this suit not being an inhabitant of this commonwealth, the clerk of this court demands of her security for the payment of the costs which may be incurred in the prosecution of the same. And the court doth order that unless such security be given within sixty days from the date hereof, that the bill of the plaintiff be dismissed at her costs as an act of this day:

20. *Order depriving father and mother of custody of child.*

James B, *ex parte*.

In obedience to the order made in this case on yesterday, James B., a free person of color, an infant under the age of twenty-one years, was this day again brought before this court; and the court having maturely considered of its judgment and decree to be rendered in the premises, is of opinion from the evidence that H. C. B. is a man of most infamous character, and in no respect a proper custodian for his son James, and doth order that he be discharged from the custody of his said father. And the court, further considering that his mother, Keziah, is proved guilty of adultery and to have borne a bastard, now some twelve or eighteen months old, and that therefore the said James should not be committed to her care, doth further order that a copy of this de-

(a) Upon a bill by a creditor of the decedent, in behalf of himself and others, the court will let in creditors at any time while the fund is in court. 11 Vesey, 602.

In these cases there is usually a petition by the creditor, and he is admitted a party plaintiff upon filing his petition and agreeing to contribute to the expense of the suit. See *Anderson v. Anderson, &c.*, 4 H. & M. 475. When case is before the commissioner, however, a creditor may come in and prove his claim without preferring a petition.

cision be forthwith furnished to one or more of the overseers of the poor for the city of Richmond. And as the said James was committed to the custody of the sheriff of Henrico county, at the instance of the petitioner Keziah, it is ordered that the legal expenses to the said sheriff, for keeping the said James B. in his custody, be paid by the said Keziah. And as to the costs of this case, it is ordered that the said Keziah and H. C. B., do pay the same in equal proportions, that is to say, one-half to be paid by the said H. C. B., the other half by the said Keziah.

21. Order removing a cause to the circuit court of the United States.

(Names of parties.)

The defendant P. B., having this day entered his appearance at the suit of the plaintiff, and filed a petition for the removal thereof into the Circuit Court of the United States, for the Fifth Circuit and Virginia District, and also given good and sufficient security for his entering into such court, on the first day of the next session, copies of the process issued against him, pursuant to an Act of Congress, entitled "An Act to establish the Judicial Courts of the United States," the court accepteth the security and will proceed no further in the cause.

ORDERS RELATING TO ANSWERS.

22. Answer referred to commissioner to expunge scandalous matter.

(¹) (Names of parties.)

The court doth refer the answer put in by the defendant R. B. to the bill of the plaintiffs, to one of its commissioners, for the purpose of expunging the impertinent and scandalous matter therein contained, and order the said defendant to pay the costs of executing this order.

23. Last order set aside; and commissioner to report scandalous matter.

(²) (Names of parties.)

For reasons appearing to the court, the order made in this cause on Tuesday last is set aside, and the court doth order, on motion of the plaintiffs by counsel, that the answer put in to the bill of the plaintiffs by the defendant R. B., be referred to commissioner G., for him forthwith to report to the court such mat-

ters contained in the said answer as shall be deemed by him impertinent and scandalous.

24. Exceptions to answer sustained.

(Names of parties.)

The exceptions to the answer being argued, and the said answer being adjudged insufficient, it is ordered that the defendant answer the plaintiff's bill more fully and sufficiently; and that he pay to the plaintiff his costs, occasioned by such insufficient answer.

25. Answer and exceptions referred to a commissioner.

The court doth order, that commissioner L. do look into the plaintiff's bill, the defendant's answer, and the plaintiff's exceptions taken thereunto, and report forthwith, whether the defendant's answer be sufficient in the points excepted to or not.

26. Report of commissioner confirmed; and answer adjudged insufficient.

The court taking into consideration the report of commissioner L., made in pursuance of the order of the 17th day of the present term, doth confirm the said report, and doth adjudge the answer of the defendant, so far as it is reported, not to be responsive to the bill, to be insufficient. And it is further ordered, that the defendant answer again as to those matters, and pay to the plaintiffs all the costs by them expended about their said exceptions.

27. Defendant ordered to be brought into court to answer interrogatories.

On motion of the plaintiff, by counsel, and for reasons appearing to the court, it is ordered that the defendant H. L., Jr., be brought into court by ———, a messenger for that purpose, to answer interrogatories upon oath; because the said H. L., Jr., hath failed to file his answer in the time prescribed by law, although duly served with process for that purpose.

PROCESS OF CONTEMPT TO COMPEL AN ANSWER.

28. Order for attachment.

(¹) See *post* order, making absolute rule for attachment against a purchaser, and accommodate to case of answer.

29. Attachment, with proclamation awarded.

(*) The attachment sued forth against the defendant for his contempt in not filing an answer (or, a sufficient answer) to the bills of plaintiff, being returned not found, on the motion of the plaintiff, by counsel, an attachment, with proclamation, is awarded against the defendant, returnable here, &c.

30. Commission of rebellion awarded.

The sheriff of the county of H. having returned the attachment with proclamation, sued forth against the said C. P., the 4th day of October last, that he had caused proclamation to be made as commanded by the said writ, and that the said C. P. is not to be found within his bailiwick, on motion of the plaintiff, by counsel, a commission of rebellion is awarded against the said C. P.

31. Writ of sequestration nisi.

It appearing to the satisfaction of the court, if J. F., who was committed to the jail of the county of G., by virtue of a writ of attachment sued forth against him for his contempt in not answering the bill of plaintiff in this cause has made his escape from the said jail, and is now going at large, on motion of W. R., by counsel, the court doth award a writ of sequestration against the said J. F., and appoint J. W. II., or any two of them, commissioners to execute the said writ, unless the said J. F., on the first day of the ——— term next, after he shall have been served with a copy of this order, shew cause to the contrary.

32. Writ of sequestration awarded absolutely.

This day came the defendant, W. R. by counsel, and it appearing by the affidavit of J. C. L., that J. T. hath been duly served with a copy of the rule entered against him in this cause the 23d day of June last, and he failing to appear and shew cause against it, on motion of the defendant, W. R., by counsel, the said rule is made absolute; and the court doth appoint J. W. R., or any two of them, commissioners to execute the writ of sequestration awarded by the said rule.

33. Order for Commissioners named in writ of sequestration to sell goods and rent out lands.

R. B. and C., three of the commissioners named in the writ of

sequestration heretofore issued in this cause, having made return thereof that they have entered upon all the real estate whereof the said J. F. was seized and possessed; and also, that they have taken into their hands all his personal goods and chattels whereof he was found in possession, subject, as they suppose, to the incumbrances annexed to their said return, but which they hold ready for the further order of the court; on the motion of the said W. R., by counsel, it is ordered that the said commissioners who made the return aforesaid, or any two of them, after giving reasonable public notice thereof, do sell at public auction, all the goods taken by them as aforesaid, for ready money, and that they pay the proceeds thereof into the Bank of Virginia, to the credit of ———, subject to the future order of the court; and that they or any two of them, do henceforth proceed to rent out such of the lands stated in their said return as are not already rented; and that they, or any one of them, do proceed to the collection of the rents that are, or may become due, for any of the said lands rented, or to be rented, and pay the amount thereof into the said Bank, to the credit of ———, subject to the future order of the court, unless the mortgagees, whose deeds are annexed to the said return, being severally served with a copy of this order, can shew cause to the contrary, on or before the first day of the next term after such service.

PROCESS OF CONTEMPT TO COMPEL OBEDIENCE TO DECREES.

34. *Rule for attachment against purchaser.*

A. B., *plaintiff*, against C. D., *defendant*.

It appearing to the court, from the report of P. H. of the sale, made by him as commissioner of this court, under the decree entered herein on the eleventh day of February, eighteen hundred and forty-nine, that J. R. C. became the purchaser of the property sold under the said decree, and that he hath failed to comply with the terms of his said purchase: On the motion of the plaintiffs by counsel, the court doth order that an attachment be sued forth against the said J. R. C. for his contempt in failing to pay into the office of discount, and deposit of the Farmers Bank of Virginia at Alexandria, the sum of six hundred and seventy dollars thirty-one and one-fourth cents, on the eighteenth day of May eighteen hundred and forty-nine, that being the amount of the note executed by him for a portion of the said purchase money and negotiable and payable at the said Bank at the date aforesaid, and taken under and in pursuance of the directions of the said decree of sale. Unless the said J. R. C. having been previously served with a copy of this order, shew cause to this court to the contrary on Saturday the twenty-fourth day of the present month.

Attachment made absolute.

On motion of the plaintiff, by counsel, and for good cause shown, the court doth order that an attachment be sued forth against J. R. C., the purchaser of the property sold under the decree entered in this cause on the 11th day of February 1849, for his contempt in failing to comply with the terms of his said purchase by failing to pay into the office of discount and deposit of the Farmers Bank of Virginia at _____, the sum of \$670 31½ cents on the 18th day of May 1849.

NOTES.—For form of attachment, see p. 414 *ante*, and follow form there found changing the endorsement to adapt it to this case, thus: "For not obeying the decree of _____ requiring within named J. R. C. to comply with, &c., (following terms of the order.)" If the attachment be executed, the body of J. R. C. will be brought in the presence of the court, which will make such order as it deems fit. If attachment be returned "not found," then pursue the ordinary process of contempt, &c., to a sequestration. See *ante* p. 414, and accommodate processes to the case of disobeying a decree.

As to process of sequestrators, see 11 Dan. Ch. Pr. 715, *et seq.*

Order granting leave to re-examine witnesses.

The plaintiff, by his counsel, this day moved the court for an order allowing him to re-examine and retake the depositions of S. G. and R. H. D., whose depositions have been heretofore taken in this cause, of which motion the plaintiff produced a notice with evidence of the due service thereof upon the defendant, W. J. C., and the said plaintiff also filed his own affidavit in support of the said motion: On consideration whereof the court doth grant to the said plaintiff leave to re-examine and retake depositions of S. G. and R. H. D., to be read as evidence on behalf of the said plaintiff in this cause, giving to the defendants reasonable notice of the time and place of retaking the said depositions, and reserving to the said defendants all just and legal exceptions to the reading of the same, when retaken.

Demurrer to a bill adjudged good, and bill dismissed.

This day, &c., and thereupon, the demurrer of the defendant to the plaintiff's bill being argued, it is the opinion of the court, that the said demurrer is good: Therefore, it is decreed and ordered, that the said bill be dismissed; and that the plaintiff pay to the defendant his costs.

[Sometimes, as stated in preceding volume, the court in adjudging a demurrer good, allows the party to amend his bill.]

Leave granted to amend bill.

On motion of the plaintiff, by counsel, leave is granted him to amend his bill, and to make new parties. And the cause is sent to the rules for that purpose.

Motion to file a bill of review overruled.

Upon the motion of the plaintiff, by counsel, for leave to file a bill of review to the decree of this court, pronounced in February last, pursuant to a decree of the Court of Appeals, pronounced on the 8th day of November 1810: On consideration thereof, the court is of opinion, that the errors assigned in said bill are not sufficient to authorise a review of the said decree; and, therefore, doth reject the motion.

Cause revived by consent.

The defendant B. L., having departed this life, by consent as well of the plaintiffs as of H. L. and T. L., executors of the said B. L., deceased, it is ordered that this suit stand revived against the said executors.

XI.

Final process in United States Circuit Courts and in Virginia State Courts.

UNITED STATES COURTS.

Fieri facias.

The President of the United States of America to the Marshal of the Eastern District of Virginia, greeting:

You are hereby commanded that of the goods and chattels of A. B., you cause to be made the sum of \$500, with interest on \$496 part thereof, to be computed at the rate of six per centum per annum, from the 2nd day of November, 1853, until paid, which J. W., late in the Court of the U. States for the Fourth Circuit and Eastern District of Virginia, hath recovered against the said A. B., by a decree in chancery pronounced on the — day of —, whereof the said A. B. is convict, as appears to us of record: And that you have the said sum of money and interest

before the Judges of said Court at Richmond, on the ——— Monday of ——— next, to render to the said J. W. of the sum of money and interest as aforesaid, and have then there this writ.

WITNESS, R. B. T., Chief Justice of the Supreme Court of the United States,^(a) at Richmond, this ——— day of ———, and in the ——— year of the Independence of the U. States of America.
P. M., Clerk.

Writ of assistance.(a)

The President of the United States of America, to the Marshal of the ——— District of ———, Greeting:

Whereas, by a certain decree (*or order*;) made in our Circuit Court of the United States for the ——— Circuit, &c., in a certain cause therein depending between A. B. complainant, and C. D. defendant, on the ——— day of ———, it was, [among other things therein contained] ordered, adjudged and decreed by the said court, that the said defendant C. D., should delivered into the possession of the said A. B., a certain lot of land (here describe land;) and whereas a proper affidavit has been made before the clerk of our said court,^(b) that the said A. B. did on the ——— day of ———, make a demand on the said C. D. for the delivery of the said land into his, the said A. B.'s possession, according to the tenor and true intent of the said decree (*or order*;) and that the said C. D. did thereupon refuse to make such delivery and to obey the said decree (*or order*;) therefore, we command you that immediately after receiving this writ, you go to and enter upon the said land, &c., and that you eject and remove therefrom all and every person or persons holding and detaining the same, or any part thereof, against the said complainant; and that you put and place the said complainant, or his assigns, in the full, quiet and peaceable possession of the said land, &c., without delay; and him the said complainant in such possession thereof from time to time maintain, keep and defend, or cause to be kept, maintained and defended, according to the tenor and true intent of the said decree, (*or order*) of our said court.

WITNESS, R. B. T., Chief Justice of the Supreme Court of the United States,^(c) at Richmond, this ——— day of ———, and in the ——— year of the Independence of the U. States of America.
P. M., Clerk.

(a) See note (b) to form of subpoena *ante*, p. 409.

(a) See IX. Rule Supreme Court U. S., *ante*, p. 221; also sec. 319, 321, of preceding volume.

(b) Or before any officer legally authorised to administer such affidavit.

(c) See note (b) to form of subpoena *ante*, p. 409.

The injunction which formerly preceded the issue of a writ of assistance in the English courts, was as follows :

George the Second, by the grace of God, of *Great Britain, France and Ireland*, King, defender of the faith, and so forth, To —, his counsellors, attorneys, solicitors and agents, and every one of them, greeting : Whereas it hath been represented unto us, in our Court of Chancery, on the part of — complainant, that he hath lately exhibited his bill of complaint into our said Court of Chancery, against you the said — defendant, to be relieved touching the matters therein contained, and that you the said defendant being served with a writ, issuing out of our said court, commanding you to appear to and answer the said bill, *have not obeyed the same, but are in contempt to an attachment for not appearing to and answering the said bill* ; and yet in the meantime you unjustly, as is alledged, prosecute the said complainant at law, touching the matters in the said bill complained of : We, therefore, in consideration of the premises, do strictly enjoin and command you the said —, and all and every, the persons before mentioned, under the penalty of two hundred pounds, to be levied on your and every of your lands, goods and chattels, to our use, that you and every of you do absolutely desist from all further proceedings at law against the said complainant touching any of the matters in the said bill complained of, until you the said defendant shall have fully answered the said bill, cleared your contempt, and our said court shall make other order to the contrary. But nevertheless, the said defendant is at liberty to call for a plea, and to proceed to trial thereon ; and for want of a plea, to enter up judgment ; but execution is hereby stayed.

Witness ourself at *Westminster*, this — day of —, in the — year of our reign.

PROCESS OF CONTEMPT.

For process of contempt to enforce obedience to decrees, see "*Process of Contempt*," *ante*, p 418.

VIRGINIA STATE COURTS.

Fierifacias.

THE COMMONWEALTH OF VIRGINIA, *To the — of — County, Greeting :*

We command you that of the goods and chattels of A. B., late in your bailiwick, you cause to be made the sum of — dollars, with interest thereon, &c., which C. D. lately in our Circuit Court for the County of —, recovered against him by a decree in chancery rendered by the said court ; also the sum of — dollars, which to the said C. D., in the same court, were adjudged for his costs in that suit expended ; whereof the said A. B. is

convict as appears to us of record, and that you have the said sums of money before the Judge of our said Circuit Court, at the Courthouse in the County of —, on the first day of the next term, (a) to render to the said C. D. of the principal money, interest and costs aforesaid. And have then there this writ.

Witness, J. E., Clerk of our said Court, this — day of —, A. D. 185—, and in the — year of the Commonwealth of Virginia.

J. E., Clerk.

Venditioni exponas.

THE COMMONWEALTH, &c., *Greeting :*

We command you that you expose to sale those goods and chattels of A. B., to the value of —, which, according to our command, you have taken, and which remain in your hands unsold, as you have certified to our judges (or justices,) of our — court, to satisfy C. D. the sum of —, whereof, in our said court, he hath recovered execution against the said A. B., by virtue of a judgment in the said court, and that you have, &c. Witness, &c., &c.

Writ of elegit.

See Code of Virginia, chap. 187, sec. 8, for form of this writ and return thereon. See also chap. 186, sec. 1.

Process of contempt.

For process of contempt to enforce obedience to decrees, see section 318 of preceding volume ; also process of contempt, p. 413 *ante*.

a) If returnable to rules, omitting italics, say : " And how you shall have executed this writ, make known at the clerk's office of our said Circuit Court at the rules to be held for the said court, on the first Monday, in — next."

ADDENDA.

The following additional cases affecting equity pleading and practice are cited from the 10th volume of Grattan's Reports:

Decrees.—In a bill by purchaser of land for a rescission of the contract for failure by vendor to convey the land, there being a latent ambiguity in the contract of sale, which can only be cleared up by a survey, it is error to decree a rescission of the contract until a survey is made, and it is thus ascertained whether the vendor can comply with his contract. *Purcell v. McCleary & als.*, 10 Grat. 246.

In a proceeding for the sale of infant's lands under the value of \$300, (act Rev. Code 1819, ch. 96, sec. 20; Suppl. Rev. Code, ch. 149, sec. 2,) the order or decree is conclusive upon the infant, and he has no day in court to show cause against it upon his coming of age. *Parker & als. v. McCoy & als.*, 10 Grat. 594; and though the decree in such case gives the infant a day in court, this will not entitle him as against a *bona fide* purchaser under the decree to disturb the sale. *Ibid.*

Where the record stated that the cause came on to be heard by consent, and an interlocutory decree was entered directing the sale of the land mentioned in the bill; and at a subsequent day of the same term, it was suggested that there was another suit pending in the same court by another plaintiff against (the defendant in first suit) and others, and by consent of parties the suits were amalgamated so far as to be heard together; and by like consent, it was ordered that the decree for sale in the first suit should be considered as having been pronounced in both causes—*held*, that the consent of both parties merely cured any irregularities as to the time of bringing on the first cause for hearing, the amalgamating the two causes, and in making the decree as entered in the first cause, a decree in both cases without a formal entry in each case, and that the consent did not extend to the decree directing the sale of the land, or cure any error therein. *Buchanan vs. Clark and als.* 10 Grat. 164.

When a decree in a chancery cause states that the order of publication against an absent defendant has been duly published, it is to be taken in an appellate court, that every thing required by the statute has been done. *Moore & als. v. Holt*, 10 Grat. 284.

Fraudulent Conveyance.—A creditor at large may maintain a suit in equity to set aside a fraudulent deed conveying real estate.

made by his debtor, both the debtor and his grantee living and being out of the commonwealth. *Peay v. Morrison's ex'ors*, 10 Grat. 149.

Injunction.—An injunction refused by a Judge of the Circuit Court, is presented to a Judge of the Court of Appeals, who also refuses it. It may be granted by another Judge of the Court of Appeals. *Jaynes & als. v. Brock*, 10 Grat. 211.

A purchaser of land coming into equity to enjoin a judgment for the purchase money on the ground of defect in the title, though the title is afterwards perfected, is entitled to his costs, and the injunction to be dissolved without damages. *Ibid*: *Reeves v. Dickey*, 10 Grat. 138.

Though the owner of lands has the legal title and may maintain trespass, yet equity has jurisdiction to enjoin another party who claims the lands from taking iron ore from it. *Anderson v. Harvey's heirs*, 10 Grat. 386.

An injunction to a judgment at law will not be sustained to allow the defendant at law to set up payments or set-offs which he might have pleaded at law; and if a discovery was necessary to enable him to prove them he should have filed his bill of discovery in aid of his defence at law; or he should have filed interrogatories to the plaintiff under the statute. *George v. Strange's ex'or*, 10 Grat. 499.

An injunction to a judgment at law will not be sustained where the defendant at law has failed to make his defence at law from ignorance of the nature of the proceeding against him; and a misapprehension of the steps necessary to be taken in order to subject him. *Meem v. Rucker*, 506.

The mere averment by a plaintiff in his bill asking for an injunction to a judgment at law, of the facts constituting his excuse for not defending himself at law is not sufficient; he must prove them. *Ibid*.

The damages upon the dissolution of an injunction to a judgment, becomes as to the party obtaining the injunction a part of the judgment, and embraced in the lien of the judgment. *Michaux's adm'r v. Brown & als.*, 10 Grat. 112.

An injunction to inhibit the sale of property by trustees is not a bar to their bringing an action at law to recover the trust property; and even if they are guilty of a contempt, that is to be redressed by the Court of Chancery acting upon the parties, and will not prevent the maintenance of the action at law. *Nichols v. Campbell*, 10 Grat. 560.

Plaintiff in a foreign attachment may enjoin the sale of the attached effects under an order of a court of law at the suit of creditors proceeding by attachment at law. *Moore & als. v. Holt*, 10 Grat. 284.

W. being the owner of a lot in Danville, made a verbal agreement with S. for the sale of it to him. S. sold to A., who received a conveyance for the lot from W., with a general warranty, and executed his bonds to S. for a balance of the purchase money. At the time of the sale the lot was made more valuable by a change in the street, which street was afterwards returned to its original location by the town authorities. S. having made no representations on the subject to A., having been guilty of no fraud, and having made no warranty of title, is not liable to A. for the damage he has sustained; and A. cannot enjoin the collection of the purchase money. *Price's ex'ors v. Ayres*, 10 Grat. 575.

A party claiming that he has not been credited for all money paid by him to the sheriff on an execution, may have any injustice done to him in that respect corrected by the court from whence the execution issued; and it is not a case for an injunction and relief in equity. *Morrison v. Speer*, 10 Grat. 228.

Partition.—Upon a bill for the partition of land, if the title of the plaintiffs is doubtful, the court, prior to the act, Code, ch. 124, sec. 1, p. 526, should have sent the parties to law to try their title; but by this act a court of equity may decide upon the title in suits for partition; and this though the suit was commenced before the statute was enacted. And after allowing a reasonable time to the parties for trial, should proceed to decide the question, observing the general rules of practice in courts of equity for the purpose of ascertaining facts either by a jury or otherwise, as may be most proper. *Currin & als. v. Spraul & als.* 10 Grat. 145.

SUPPLEMENTARY NOTES

To Note(a.) p. 447, ante.

In the form of the decree, as found on p. 446, 447, for abundant caution, a clause is inserted directing that the parties in a partition suit be decreed to execute mutual conveyances of the parcels of land severally assigned to them; and in note (a) to that decree, English authorities are cited establishing, that while partition made at law vests the legal estate in the parties to whom land is assigned, a partition in equity vests only the equitable right. It may be proper to add, that in Virginia, the clause above referred

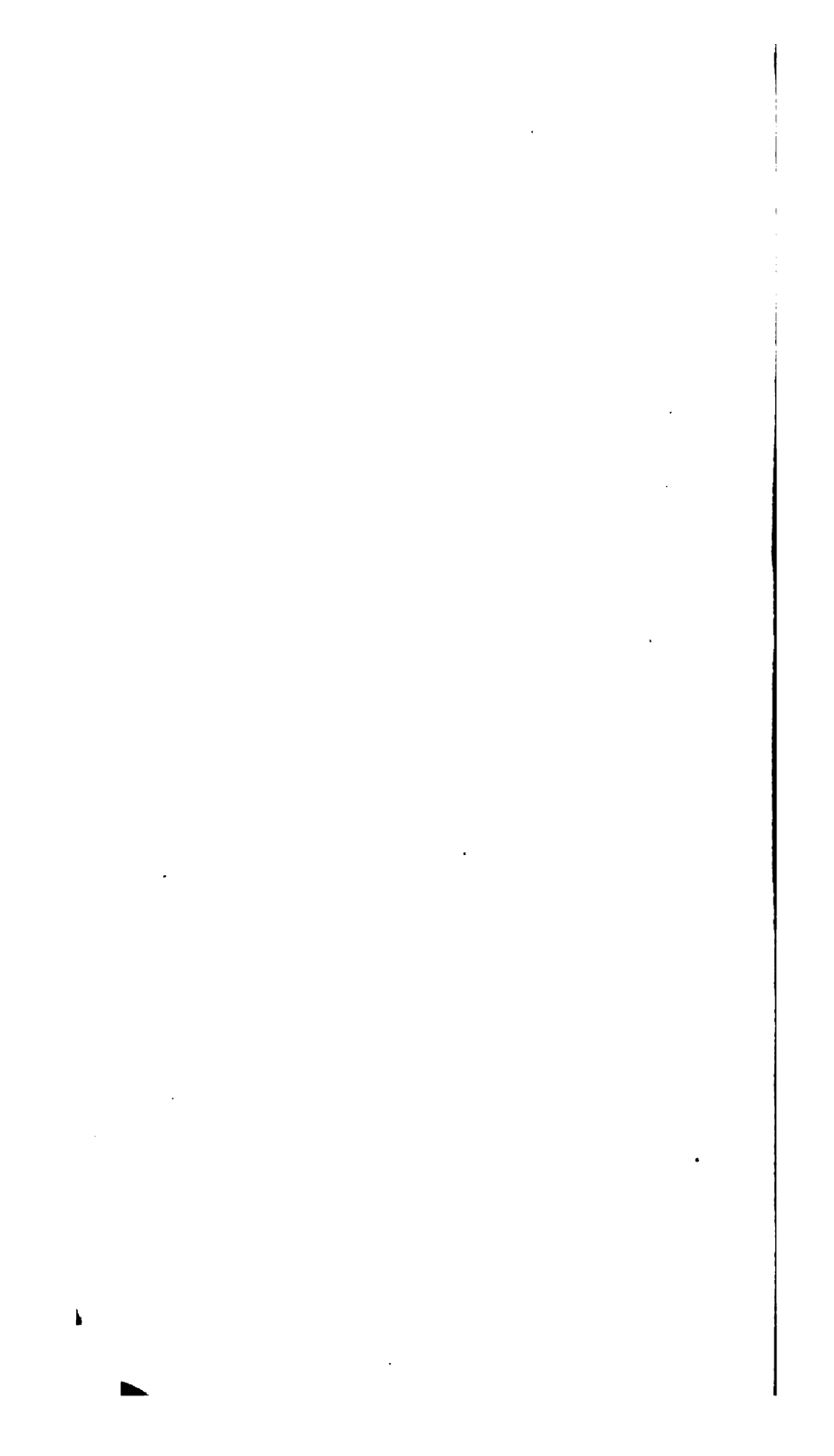
to is not usually inserted in decrees of partition. In decrees drawn by accurate and experienced counsel, it is most frequently omitted. The writer has seen no case in which the exact question determined by the English authorities has arisen before the Virginia Court of Appeals. In all probability, when it does arise, because of the almost universal practice omitting the clause above cited, our courts to quiet the numerous titles held under partition decrees so entered, will hold differently from the English cases before mentioned. In a case before Chancellor Kent,^(a) that eminent Judge held that under the terms of the New York statute, the clause referred to was not necessary; the act of New York providing that all partitions made under and in virtue of the proceedings had in the Court of Chancery shall be firm and effectual forever; and that the final decree of the court for, or upon the partition, &c. should be binding and conclusive, as absolutely as if such partition, &c. had been made in a court of law. In that case the decree was: "That the said partition remain firm and effectual forever; and that the said parties respectively hold and enjoy, in severalty, the said portions of the premises set apart and allotted to them as aforesaid."

By our present statute in Virginia, partition should only be made in courts of equity. See Code of Virginia, chap. 124, sec. 1, and Revisors' Report on this section.


To p. 360 ante.

On a former page it was stated that a plaintiff cannot by means of a bill to foreclose, obtain at once the whole effect of a suit in equity upon the mortgage and of a suit at law upon the bond—that on the bill to foreclose he will be confined to the mortgage subject, the foreclosure suit not being intended to act *in personam*. In support of this position, English authorities were alone cited. The doctrine is announced in II. Rob. Pr. 59, and reference is there had to the authorities found on p. 360 *ante*. It has been questioned whether this doctrine, thus broadly stated, prevails in England, and if it does, whether it would prevail here. A writer of acknowledged ability and learning affirms the contrary to be the practice in Virginia so far as his own observation and experience extend. See Appendix to Wythe's Reports, *edit.* 1852, pp. 419, 20. This appendix is from the pen of William Green, Esq., of Culpeper, and contains among other useful essays a learned, elaborate and thorough discussion of the subject of foreclosure of mortgages in Virginia.

(a) *Young & ux. v. Cooper & als.*, 3 John. Ch. Rep. 295.



INDEX TO THE PRINCIPAL MATTERS.

 The figures in the body of the following Index refer to sections.

A.

	PAGE.
Abatement of suit, at rules, 7, 10.	
Abatement and revivor, ordinary effects of, upon the proceedings of a cause in the English courts, <i>note</i> ,	183
Absent defendants—how proceeded against, 78. When case may be tried or heard as to, 81.	
<i>Accounts</i> , settlement of before commissionerr, 335, <i>et seq</i> ,	437, 445
Decrees for settlement of,	433, 6
Of executors, administrators, guardians, &c.	437, 445
Accident—cases in which equity relieves,	370, 371
Action at law, when directed by equity courts, 333.	
Address of bills, in England, 27; in U. S. C. C., 28; in Va. S. C., 29.	
<i>Administrator</i> . See <i>Accounts, Decrees</i> .	
<i>Affidavits</i> to bills, when necessary, 62.	
Forms of,	317, 318
To pleas when necessary,	171, 401
Amended bills. See amendments of pleadings.	
Amendments of answers. See amendments of pleadings.	
<i>Amendments of pleadings</i> , 353, 378.	
Amended bills—when filed, 354, 355, 356, 357, 358, 359, 360.	
Supplemental bills, 357, 361, 367.	
Bills of revivor 368, 371.	
Bills of revivor and supplement, 372.	
Defences to amended bills, &c. 373, 376.	
Frame of amended bills, &c. 378.	
Amendments of answers, 378.	
See <i>supplemental bills</i> .	
ANSWER , in V. S. C. a defendant may be allowed to file his answer at any time before final decrees, 72.	
When filed, what the course of plaintiff, 73.	
On replication to, cause set for hearing, 74.	
Exceptions to, set down for argument, 75.	
After second insufficient answer, defendant may be examined on interrogatories or committed, 75.	
<i>General nature of answer</i> , 132, 7.	
<i>Matter of answer</i> , 138, 146.	
When proper to file, 132, 137.	
Should, beside furnishing the result of an examination, state the nature of defence upon which defendant means to rely, 133, 134.	
Should state conclusions to be drawn from facts stated, 135.	

<i>Answer</i> (cont'd.) Same degree of accuracy not required in an answer that is required in a bill, 136.	
What may be set forth in an answer, 137.	
Required, upon oath, and to be full, true, direct and sufficient, 138, 139.	
Need not be made to matter scandalous, impertinent, &c., 140, or to any thing which will subject to penalty, 140, or when answer would involve breach of professional confidence, 140, or to facts respecting defendants own title, 140, Should be made to statements and interrogatories fully, 141, limitation to this rule, 142.	
When answer should be positive, 143.	
Defendant cannot avoid stating in answer his recollection, &c., 144.	
To the <i>letter</i> of the bill not sufficient, 145.	
Should not be impertinent, &c., 146; case of impertinence in England, note 86, sec. 146.	
Case of scandal, &c. in Virginia, <i>note</i> , - - -	247
<i>Form of answer</i> 147, 153.	
Two or more defendants may join in answer, 147.	
Title of answer, 148.	
Prepared for five defendants—not received as answer of <i>two</i> or <i>six</i> ,* 149.	
Beginning of, 150.	
Substance of, 150. (<i>a</i>)	
Usually contains a denial of combination, &c. 151.	
Should be signed by counsel and defendant, 152.	
Put in, under oath, saving answers of corporations aggregate, 153.	
By consent, oath dispensed with, 153.	
Formula of, - - -	389, 391
Formula of commencements of, - - -	389
When defendant is an infant, - - -	389
When christian names of some of the defendants have been mistated in the bill, - - -	389
By one in his own right, and as administrator and guardian, - - -	389
By husband and wife, - - -	389
Of a supplemental and further answer - - -	389
Of a plea and answer, - - -	389
Formula of introduction to, - - -	390
Formula of substance of, - - -	390
Formula of conclusion of, - - -	390
Formula of affidavit, - - -	391, 401
Forms of answers, - - -	391, 397
By executor denying assets, &c., - - -	391
To a bill of injunction, - - -	394
Of mortgagor to bill of foreclosure, - - -	396
Special rules of practice concerning answers, U. S. C. C. - - -	228, 230
Decisions of U. S. Supreme Court concerning answers, - - -	296
Decisions of Va. Court of Appeals concerning answers, - - -	243, 250
When answer amended, and how, 154, 378.	
When answer contains scandalous or impertinent matter, exceptions should be filed, 157.	
See EXCEPTIONS TO ANSWERS.	
Replication to, 158; rejoinder out of use, 158.	

* We have English authority alone for this. It has been doubted by eminent counsel whether a similar rule would be adopted here.

- Appeal bond**, see **APPEALS**; also sections 291, 303.
- APPEALS**, from decisions of U. S. C. C. to what court taken, 284.
- How obtained, 291.
 - From Virginia State Courts, 285, 286, 287, 288, 289, 290.
 - How obtained, 292, 3.
 - Petition for, 293.
 - To whom petition presented, 294, 297.
 - Matter and form of petition for, 295, 296.
 - When appeal necessary, 283.
 - When allowed, 298, 9; rejected, 298.
 - Where docketed, 300.
 - How transferred from one appellate court to another, 301, 2.
 - When bond required on, and how and by whom bond taken, 303.
 - When appeal dismissed, 304.
 - After dismissal no other appeal allowed, 304.
 - When revival on proper, and manner of reviving appeal, 307.
 - On the trial of, save in special cases, parol testimony will not be heard, 306.
 - On affirmation of, damages awarded, 310.
 - Supreme Court of, in Virginia*, its jurisdiction, 286.
 - Special Court of, in Virginia*, its jurisdiction, 287.
- Appearance**, when voluntary, defendant may plead, answer, disclaimer or demur, 94.a
- When compulsory, defendant required to answer, 94, 95.
- Appellate Court**, proceedings in, 306; when a party dies, 307.
- When court will affirm or reverse a decree or order, 303.
 - Reasons to be stated in writing, when Supreme Court of Appeals of Virginia reverses or affirms a decree, 309.
- Assets**—equitable, what, and how distributed, - - - 371
- What the effect of provisions of Code of Virginia on doctrine of legal and equitable assets, - - - 371
 - Bill to marshal, - - - 323
 - What may be recovered by administrator de bonis non, 371
 - Answer of executor denying assets, - - - 391
- Assistance** writ of, 319;—form of, - - - 487
- Attachment**, see **PROCESS OF CONTEMPT**.
- Attachment with proclamations**, see **PROCESS OF CONTEMPT**.
- Averment of jurisdiction**. See **Bills**.
- Bail** in equity causes in Virginia, - - - 371
- BILLS**, several kinds of, 11, 12, 13, 14.
- Original, 11.
 - When original bill should be filed in V. S. C. 67, and note 1; in U. S. C. C. 265.
 - Not original, 11.
 - In the nature of original bills, 11.
 - Form of, original, 24, 63.
 - When taken for confessed how cause proceeded in, U. S. C. C. 273.
 - Of review, 283, 463, 475, - - - 5
 - Of revivor, 368, 371, and supplement, 372.
 - Supplemental, 357, 361, 367.
 - Matter of bills, 15, 23.
 - Should state plaintiff's right accurately, 15.
 - Should contain every essential fact, 16.
 - Should show sufficient matters of fact to sustain plaintiff's case, 17.
 - Should show that parties defendant are liable, &c., 18.
 - In bills, multifariousness to be avoided, 19.

BILLS, Should not contain scandalous or impertinent matter, 20.	
To be signed by counsel, 62.	
When affidavit necessary, 62.	
When bill taken for confessed, 69.	
Decisions of Court of Appeals of Virginia affecting bills, 250-255	
Decisions of Supreme Court of United States affecting bills	
in U. S. C. C. -	296-8
OF REVIEW. Decisions of Court of Appeals of Virginia af-	
fecting, -	255-259
General Formula of -	312-18
(1) Address of, pp. 312, 313; also sections 27, 32.	
(2) Names of plaintiffs in, pp. 312, 313; also sections 27, 32.	
(3) Statement in, p. 313; ss. 34, 41.	
(4) Charge of confederacy, p. 313; ss. 42, 43.	
(5) Charging part, p. 313; ss. 44, 46.	
— forms of, taken from Whitworth, pp. 313, 315— <i>Note</i> .	
(6) Averment of jurisdiction, p. 314; ss. 47, 50.	
(7) Interrogating part, p. 315; ss. 51, 55.	
(8) Prayer for relief, p. 315; ss. 56, 58.	
(9) Prayer for process, p. 316; ss. 59, 60.	
(10) Conclusion, p. 316; ss. 61, 62.	
(11) Affidavits, p. 316, 317, 318; s. 62.	
To a bill for injunction, &c. -	317
To a bill of interpleader, -	317
To a bill to perpetuate testimony, -	317
To a bill of discovery, -	317
To a cross-bill, -	318
To a bill of review, -	318
FORMS OF : Bill of foreclosure of mortgage in U. S. C. C. -	319
" : bill of foreclosure in V. S. C. -	321
" : bill for specific performance of agreement by ven-	
dor against vendee, -	322
" : bill by simple contract creditors against adminis-	
trators, &c., to marshal assets, -	323
" : bill by a landlord against lessee for years, for	
waste, with prayer for special relief and for in-	
junction, -	326
" : bill by next of kin for account, -	329
" : bill of injunction to enjoin the creation of a nuisance, -	331
" : bill for partition, -	335
" : bill of injunction to prevent infringement of copy-	
rights, -	336
" : bill for divorce, -	340
" : bill to perpetuate testimony, -	342
" : bill of review, -	343
" : bill by husband of legatees against an executor	
for payment of legacy, -	344
" : bill of interpleader, -	345
" : bill of discovery, -	347
" : cross bill, -	349
" : supplemental bill, -	350
" : amended bill, -	351
" : bill of revivor, -	351
" : English bill, -	377
FORMS OF STATEMENTS IN, -	353, 4
In bills for specific performance by vendor, -	353
In bill for lease or sale of land of persons under disability in	
Virginia, -	354
FORMS OF INTERROGATORIES IN, -	354, 356

	PAGE
BILLS (cont'd.)	
<i>See interrogatories in bills.</i>	
FORMS OF PRAYERS IN,	- 356, 359
<i>See PRACTICAL NOTES ON BILLS AND,</i>	- 359, 377
BOND , on appeal from Virginia S. C., s. 303.	
On appeal from U. S. C. C., s. 291.	
Not required in V. S. C., when appeal proper to protect estate of a decedent, of a convict or insane person, s. 303.	
BOUNDARIES , settlement of, by courts of equity, in what cases jurisdiction exercised,	376
Certiorari ,	475
Charging part of bill, s. 44, 46, usually omitted in U. S. C. C. and V. S. C., s. 46	
Circuit Courts of Virginia, original jurisdiction, X., appellate jurisdiction, 289, 290.	
Circuit Courts of United States, original jurisdiction, X., appellate jurisdiction, 284.	
Co-defendants , decrees between, 245, and <i>note</i> .	
COMMISSIONERS IN CHANCERY : Their duties on reference of accounts for settlement, 334, 348.	
Notice of time of settlement, 335; how notice served, <i>note</i> 12 to sec. 335.	
When in U. S. C. C. the reference must be presented to commissioner, 336.	
Party failing to attend commissioner after notice, subjects himself to process of contempt, 337.	
Commissioner may adjourn his proceedings from time to time without new notice, 338.	
Report retained by commissioner ten days after completion, in V. S. C. 338.	
When commissioners in U. S. C. C. may proceed <i>ex parte</i> , 339.	
Parties may be examined on oath, 340; how examination conducted, 340.	
Parties may be required to produce books, &c., 341.	
How examination of witnesses taken, 342; new notice not necessary, 342.	
How attendance of witnesses compelled, 343.	
On failure to attend, process against witness, 344; limitation of rule in V. S. C. 345.	
In what form parties accounting before masters in U. S. C. C. are required to bring in accounts, 346.	
What affidavits, may be read before master in U. S. C. C. 346.	
<i>How reports made up and returned</i> , 347, 348; what necessary when master doubts as to any point raised, 347.	
<i>Exceptions to reports</i> when allowed, 349; nature of, 351; if overruled costs given in U. S. C. C. 350.	
Committee — <i>see</i> BILLS and MEMORANDA .	
Condition of bond on appeal in U. S. C. C., <i>note</i> to sec. 291.	
Condition of bond on appeal in V. S. C. 303.	
Consolidation of cross and original suits, 461.	
Contempt — <i>see</i> PROCESS OF CONTEMPT .	
Convict , when appeal is for benefit of, in V. S. C. no bond required, 303.	
Copyrights , appeals from decisions in U. S. C. C. concerning, 284.	
Corporations , how served with process, 5.	
<i>Aggregate</i> , answer on oath not required of, 153.	
Process of contempt against, 86.	
Distringas against, 86; form of distringas, <i>note</i> (27,) 86.	

	PAGE
Sequestration against, cannot be stayed by appearance, 86.	
COUNTY AND CORPORATION COURTS OF VIRGINIA, their original jurisdiction, Introduction, XI., their appellate jurisdiction, 285.	
Courts, see COUNTY AND CORPORATION COURTS, &c., CIRCUIT COURTS OF VIRGINIA, CIRCUIT COURTS OF U. STATES, APPEALS, (SUPREME COURT OF,) (SPECIAL COURT OF,) DISTRICT COURTS OF VIRGINIA.	
Cross Bills, 14. when necessary to file, 166, 451, 453.	
When brought to obtain discovery or relief, 452.	
Why necessary to file, 453.	
Sometimes required to enable a defendant to avail himself of defence, 454; to enable defendant to obtain decree against a co-defendant, 454.	
Jurisdiction of, not ousted by a dismissal of original bill, 455.	
What cross bill should state, 456.	
In a cross bill a party cannot question what he has admitted in his answer, 456.	
Form of, like original bill, 457.	
Form of,	349
Defence to cross bills, 458, 462.	
Plaintiff in original bill, may plead, answer or demur, 458.	
What pleas do not lie, 458, and note (54.)	
Plaintiff in original bill not compelled to answer until cross bill is answered, 459; how this priority lost, 459.	
When cross bill taken for confessed, its effect, 460.	
Court may order cross and original suits to be heard together, 461.	
Hearing of original cause not suspended, when, 461.	
Sometimes directed at hearing of original bill, 462.	
Decedent's estates, disposition of assets of, p. 371, see administrator.	
DECREES, distinction between decrees proper and interlocutory orders, 237.	
Definition of, 239.	
Either interlocutory or final, 240; what interlocutory? 240, and note (4,) final? 240, and note (5.)	
First, rarely final, 241; course taken in certain cases, 241; feigned issues, note (6,) sec. 241.	
When preliminary inquiries directed and by whom made, 242, 243.	
Conditional, in English Courts, 244; such decrees not made by Virginia State Courts, 244.	
Nisi in V. S. C. note to sec. 244.	
May be made by one defendant against another defendant, 245; limitation of rule, 245.	
Form of, 246, 253.	
(1) date and title, 247; in English courts, 247; in U. S. C. C. and V. S. C. 247.	
(2) Recitals, in English courts 248; in U. S. C. C. 249; in V. S. C. 250.	
(3) Ordering part, 251.	
(4) Declaratory part, 252.	
FORMS OF, IN SPECIAL CASES.	429, 491
DECREES IN UNITED STATES COURTS,	429, 430
General formula, 249,	429
Decree for account,	429
Order granting injunction in copyright,	429
Decrees perpetuating injunction cases,	430

	PAGE
DECREES IN VIRGINIA STATE COURTS.	
General formula of decrees, -	430
Formula of decree in which guardian ad litem assigned infant in court, answer filed, &c. -	430
Formula when absent and unknown defendants and guardian assigned infant defendants at rules, -	431
Formula when bill taken for confessed as to defendants, answers of the remainder; depositions, &c. -	431
Reviving suit against personal representative of one defendant and real representations of another, -	432
Formula of entry in case of a friendly bill and answer, -	432
<i>Decrees respecting infants, insane persons, &c.</i> -	457, 462
Orders on motion for additional security against guardian, -	457, 8
Infants, plaintiffs, arrived at age, -	459
Orders concerning insane persons. -	459, 462
<i>Orders concerning injunctions,</i> -	462, 3
Order of injunction restraining waste, -	462
“ of injunction to stay proceedings at law. -	462
“ dissolving injunction to judgment and dismissing bill, -	463
“ dismissing bill after dissolution of an injunction, -	463
“ perpetuating injunction, -	463
<i>Decrees concerning husband and wife,</i> -	465, 8
Decree for divorce <i>a vinculo</i> , &c. -	465
Same in a cause in which attorney general was made a party, -	466
Decree for divorce and alimony, -	467
Order for payment to plaintiff during suit for divorce, -	467
<i>Decrees respecting wills,</i> -	469, 71
Decree construing will, -	469
<i>Decree for specific performance,</i> -	471
Decree for specific performance, -	471
Another decree do. do. -	471
<i>Decrees for accounts,</i> -	433, 446
Decree for settlement of accounts generally, -	433
Decree for settlement of admin. and guardianship accounts of intestate, &c. -	433
Decree overruling some exceptions to a report, sustaining a part of one of them and directing payment of balances found due on settlement of administration and guardianship accounts, -	434
Decree for settlement of executorial or administration accounts, -	435
Decree for distribution of estate after return of commissioner's report under last decree, -	435
<i>DECREES respecting partition, &c.</i> -	446, 9
Decree appointing commissioners to allot shares, &c. -	446
Decree confirming commissioners report and directing conveyances, -	446
<i>See note to this form on p.</i> -	492
Decree directing commissioners in another case to allot shares, -	447
Decree directing sale; commissioners having reported land indivisible in kind, -	448
<i>Decrees for foreclosure of mortgages, &c.</i> -	
Decree for foreclosure of mortgage and sale of property, -	451
Commissioners appointed by preceding order report sale, sale confirmed and decree for conveyance, -	452
Decree for payment of plaintiff's debt out of proceeds of sale, and directing defendant to check for the residue, -	453
Decree for account under bill for equity of redemption, &c. -	454
Decree requiring plaintiff (mortgagor) to pay mortgagee amount found due, and in default, a sale of premises directed, -	454

	PAGE
Decree in suit for specific performance by assignee for value against assignor, vendor and vendee, -	473
Orders removing cause from county or corporation courts, -	475
Orders for removal of cause from county to a circuit court, -	475
Order for removal from one circuit court to another, -	476
Order changing plaintiffs to make them witnesses, -	476
Order in partition suit moving cause to circuit court, dividend of party exceeding \$300, -	477
Order appointing guardian ad litem, -	477
Rule to speed, -	478
Defendants death suggested and rule to speed, -	478
Order dismissing suit after rule to speed, -	478
Order for payment of money to plaintiff pending suit, -	478
Order for party to pay money in court, -	479
Order to lend out money, -	479
Order changing next friend of plaintiff, &c. -	479
Order allowing creditor to prefer his claim, -	480
Rule for security for costs, -	480
Order depriving father and mother of custody of child, -	480
Order removing cause to a circuit court of the United States, -	481
Orders relating to answers, -	481, 482
Orders relating to process of contempt to compel answer, -	482, 3
Orders relating to process of contempt to compel obedience to decrees, -	484, 5
Order granting leave to re-examine witnesses, -	485
Demurrer to bill sustained, &c. -	485
Leave granted to amend bill, -	485
Motion to file a bill of review overruled, -	486
Revival of cause by consent, -	486
Decisions of Virginia Court of Appeals affecting decrees in 10th Grattan, -	490, 91
Decree, nisi, form of, when entered, 68.	
Decision of Appellate Court, entered and execution thereon, 313.	
Defendants, absent or unknown, how proceeded against in V. S. C. 78.	
When defendant's appearance should be entered in U. S. C. C. 271.	
When required to file his plea, demurrer or answer, 272.	
If arrested under process of attachment when released, 274.	
Formerly not bound to answer, unless specially interrogated, in U. S. C. C. 277; different rule at present, -	242
Default of appearance, bill taken for confessed, &c., 69.	
Demurrer, when used, 97; nature of 98; what it admits as true in bill, 99.	
It may be to the relief prayed, the discovery or both, 100.	
May object to bills for relief, want of jurisdiction in the court, personal disability, want of interest, absence of liability on part of defendant, that the party is not entitled to the relief prayed for, deficiency of the bill, and impropriety of multiplying suits, or confounding distinct subjects in the bill, 101.	
Objections by, to bills for discovery, 102.	
Form of, 103, in E. C., U. S. C. C., V. S. C. 103.	
General, 104.	
Form of special, 105.	
Speaking, nature and effect of, 106.	
Special rules of in U. S. S. C. and V. C. C. 107.	
When sustained or overruled, 108, -	227
To bills other than original, 109, -	250
Procedure on, in E. C. in U. S. C. C. in V. S. C., 110, 71.	

	PAGE
Demurrer (cont'd) When filed, course of plaintiff, 175; in case of neglect by plaintiff, 176.	
When overruled, in U. S. C. C. 177; in V. S. C. 777.	
When sustained, 178, in U. S. C. C. 178; in V. S. C. 178.	
To interrogatories, 229.	
Certificate of counsel necessary in U. S. C. C. 276.	
DEPOSITIONS, (see EVIDENCE) how taken in U. S. C. C. 208, 217.	
How taken in V. S. C. 218, 223.	
Form of,	419, 28
DISCLAIMER, nature of, 159, 194.	
Distinct from answer, 160.	
Form of, and proceedings on, 161, 162, 163,	397
Discontinuance, see ABATEMENT.	
Discovery, see BILLS.	
Dismissal of suit at rules, 7, 8, 9,	403
Of suit, plaintiff failing to mature his suit, 76.	
Of bill, after dissolution of injunction, when, 411.	463
Dissolution of injunction, order for, 410; when bill to stand dismissed after dissolution of injunction, 411; appeal from order of dissolution, 412.	
Distributee's suit against executor,	371, 329
DISTRICT COURTS OF VIRGINIA, appellate jurisdiction of, 288.	
Distraingas, writ of, when issued, 86; form of, note (27) to sec. 16.	
Divorce, form of bill for,	340
Documents production of, how compelled, 224, 225, 228.	
Dower,	368
Equitable assets, see <i>Assets</i> .	
Equitable jurisdiction, VII. once attaching not lost by the enactment of statutes granting a remedy at common law, VII.	
Equity of redemption,	361, 454, 456
EVIDENCE, when introduced in equity, 197, 281; rules of, 198; of defendant admissible, 199; of plaintiffs inadmissible, 199; how evidence of plaintiff may be introduced, 200; statements of defendant to be taken as true, 201; may be controverted, 201; is taken in writing, 202; practice in E. C. 203; in U. S. C. C. 203; in V. S. C. 203; need relate only to the points in issue, 204, 205; documentary, 206.	
How taken, 207, in U. S. C. C. 208, 209, 210, 211, 212, 213, 214 215.	
Time allowed for taking, 216; proceedings when returned to clerk's office, 216; how evidence may be taken before issue, 217.	
How taken in V. S. C. 218; a commission when required, 219; when depositions are taken, 220; when to be returned, 221; by whom depositions to be taken, 222; proceedings when witnesses live beyond the state, 223.	
Witnesses compelled to attend in U. S. C. C. 224; in V. S. C. 225, 227, 228.	
Productions of documents in U. S. C. C. 224; in V. S. C. 226.	
See (DEPOSITIONS.)	
Effect of answer as evidence, s. 201,	401
Effect of plea as evidence,	401
Examination of party—see Bills, Commissioners in Chancery.	
EXCEPTIONS, to answers when filed, ss. 186, 187, in U. S. C. C., s. 200.	
When proper, s. 188, in U. S. C. C., s. 280.	
How prepared and signed, s. 189.	
Form of, s. 190; p. 398.	
When set for argument in U. S. C. C., s. 191; in V. S. C., s. 191.	
If sustained, ss. 192, 193.	

Exceptions to reports—See COMMISSIONERS IN CHANCERY.

EXECUTION OF DECREE.

When for the payment of money, may be enforced in the same way as judgments at common law, s. 316; other decrees or orders may be enforced by process of contempt, s. 316; and in some cases by writ of assistance, s. 316.

See Final Process.

In U. S. C. C., when decree for performance of specific act, s. 317; writ of attachment, s. 317; writ of sequestration, s. 317.

In V. S. C., in such cases, s. 318, rule to shew cause, s. 318; attachment, s. 318; subsequent process of contempt, s. 318.

Writ of assistance, in English courts, s. 319, in V. S. C., s. 320, in U. S. C. C., s. 321.

When a person not a party may compel execution of decree in U. S. C. C., s. 323, when compelled to obey decree in do., s. 323.

Execution, writs of, see *Final Process*.

Executors and administrators—See assets, decedents.

Fees, of the clerk in appellate courts, s. 312.

Feme covert—sue in equity by next friend, ix. See *Practical Notes on Bills—Dower, and Husband and Wife*.

Fieritias, see FINAL PROCESS.

Final Process. See EXECUTION OF DECREE, PROCESS OF CONTEMPT.

Form of fieri facias,	-	-	-	488
“ Venditioni exponas.	-	-	-	489
“ Writ of assistance,	-	-	-	487
“ Writ of elegit,	-	-	-	489
Foreclosure of mortgages,	-	-	-	359, 360
Fraud,	-	-	-	368, 369
Freedom, suit for	-	-	-	374

Guardians ad litem, how and when appointed in U. S. C. C., s. 275.

Appointed by the clerk at rules in V. S. C., s. 77, order appointing in term time, - 477

Hearing, cause in equity, in England, s. 234, in U. S. C. C., s. 234, in V. S. C., s. 234.

Mode of, similar to course in actions at common law, s. 235.

Heir and devisee, See Distributee.

Husband and wife, decrees concerning, - 465, 8

Practical notes, - 468, 9

See *Divorce, Feme Covert*, also - 374

Idiots and Lunatics, how they should sue, ix.

Defendants. See *answers, demurrers, pleas*.

Inadequacy of price, - 369

Infants—sue by their next friend, p. IX. (Introduction.)

“ defendants, guardian ad litem to, may be appointed at rules, s. 77, guardian ad litem may be compelled to act, s. 77, appointed in court, - 477

Informations, s. 64, 66, - 318, 319

INJUNCTIONS, see 396, 400, 412; also PRACTICAL NOTES ON BILLS.

Bills for should be sworn to, 403; form of affidavit, - 319

Bills for should be filed before process issues, 403; note (1), to sec. 67.

Form of bill of injunction, - 326, 331

In U. States Circuit Courts, [LV.] - 232

Practical notes on injunctions, - 364, 368

Order granting injunction, - 462

Order dissolving injunction, - 463

	PAGE
INJUNCTIONS (cont'd) Order granting injunction in case of copyright,	429
Decree for perpetual injunction restraining infringement of copyright,	430
Decree for perpetual injunction restraining infringement of copyright, and for payment of profits,	430
Interlocutory applications, 379; by motion, 379; by petition, 379.	
See <i>motions</i> and <i>petitions</i> .	
Injunctions, and	400, 20
See <i>bills, decrees, and decrees and orders</i> .	
Interlocutory proceedings, s. 195.	
Interrogating part of bills: s. 51.	
<i>Interrogatories</i> , special, not now necessary in U. S. C. C., s. 53, nor necessary in V. S. C., s. 54.	
Order to bring in defendant in V. S. C., to answer, s. 82, 87.	
Demurrer to, s. 229.	
Decisions of Court of Appeals of Virginia affecting interrogatories,	277
Issue , may be of law or fact, or both, s. 196.	
When of fact to be proved by evidence, s. 197. Rules of evidence, s. 198. Party defendant may be required to give evidence, s. 199. Not so as to plaintiff, s. 200. How a co-plaintiff may be introduced as a witness, s. 201. When statement of defendant to be taken as true, s. 201. May be controverted, s. 201. Mode of taking evidence in equity, s. 202, in English Courts, s. 203, in U. S. C. C., s. 203, in V. S. C., s. 203.	
Issues out of Chancery, when directed, ss. 241, 326, how proceeded in, 326, 328, 329, 330, 331, 332.	
Plaintiff in issue may suffer non-suit,	331
Feigned issues, not directed,	327
For trial of usual provision of decree, n. 4 to s. 628, restrictions imposed, <i>Ibid</i> .	
On trial of, bill of exceptions will not lie, s. 330.	
Result of trial of issues, certified, together with any special circumstances, s. 339.	
Application for a new trial, to whom made, s. 332.	
Insane person, when appeal for benefit of no bond required, s. 303. (a)	
Interpleader —Bills of—422, 426; defence to, 427, 428; forms of bill,	345
Affidavit to bill of,	317
Demurrer to bill of,	383
Jurisdiction of the several courts, see titles <i>Circuit Courts of Virginia, County and Corporation Courts of Virginia, District Courts of Virginia, Courts of Appeals of Virginia, Circuit Courts of the United States</i> .	
Jury , at bar of Chancery Court, to try issue, 326.	
In case of issue upon a plea, 179.	
Justice of the peace may take depositions, 222.	419
Lending out money; order directing,	479
Lunatic, 77; also p. 457, 46; and <i>insane defendants</i> .	
Marriage —see husband and wife.	
Marshalling assets—bill for, p. 323; see p. 371, 2.	
Masters —see <i>Commissioners</i> .	
Memoranda —form of, instituting suit in V. S. C. 1; p. 402, 403, (notes.)	
Mortgages —see foreclosure of mortgages.	
MOTIONS , 380, 382.	

(a) See note (a) to *petitions, post*.

	PAGE
Multifariousness , in bills, 19.	
Demurrer for, -	382
Names of plaintiffs , how set forth, 30, 31, 32.	
How introduced in England, U. S. C. C. and V. S. C. 33.	
How introduced in creditor's bill, note 27, to sec 33.	
No Execut. writs of —413, 420.	
Not used in Virginia, 416.	
See bail in equity in Virginia, -	377
Prayer in bill to obtain, in U. S. C. C. -	359
New trial motion for , in issues out of chancery, 330.	
When a second or third trial may be granted, 332.	
Next friend —of married woman, IX.	
Of infant, IX.	
Notary public may take depositions, 222, -	449
Notice to adverse party , (on taking out a separate commission in U. S. C.) to appear and fill cross interrogatories, -	420
Notice to take depositions in V. S. C. -	426
Notice by commissioners of day and place of taking accounts , 335;	
how served when parties reside in Virginia, in V. S. C., note (12) to sec. 335; if court so direct in its decree, notice may be given by advertisement, <i>ibid</i> ; when parties reside out of Virginia, notice given by advertisement, <i>ibid</i> .	
Personal service of notice on parties, or their solicitors required in all cases, in U. S. C. C. note (12) to sec. 335.	
Order of publication against absent or unknown defendants, 78, 79, 80, 81.	
Orders and Decrees. See DECREES.	
Original bills —see bills.	
In the nature of a supplemental bill, &c., 365, and note.	
Parteners —see <i>Partition</i> ; also p. 449.	
Parties to suits in equity , who should be made, VIII., IX., pp. 230, 2, 281, 293, 308, 9.	
Parties , when examined on oath before master or commissioner, 340, 346; how examination conducted, 340, 346; if they fail to answer, commissioner to report fact to court, <i>ibid</i> .	
Required to produce books and papers, &c. before commissioner, 341; on failure fact reported, 341.	
Accounting before master in U. S. C. C.; their duty, 346.	
Partnership —see practical notes on, -	372
Peace —bill of, -	376
Perpetuating testimony —bill for, 342.	
Petitions —383 386; what are, 383; when filed, 383.	
Chief requisites, 384.	
When sworn to and how signed, 385.	
Of course, what? 380, 382.	
May be made without notice, 380.	
Special , what? 380, 382.	
Should be made after reasonable notice, 380.	
By whom motions may be made, 381.	
When petition necessary, 381.	
Not the practice to institute suits by petition in V. S. C. (a)	
or U. S. C. C. 386.	
For appeal, 296.	

(a) This is strictly true, yet there are cases in which the Statutes of Virginia have expressly provided that they may be brought to the notice of a court of equity by *petition*: as, to instance, in the case of a person unlawfully detained as a slave; see Code of Virginia, chap. 106; also, a petition by a committee of a lunatic to have his property sold, &c., Code of Virginia, chap. 85, sec. 46; also, by claimant of escheated lands, chap. 113,

	PAGE
Partition—bill for, - - -	335
Practical notes, - - -	368, 447, 449
Order and decrees respecting, - - -	446, 449
Pleadings—amendments of, - - -	353, 378
Pleas, 111-131, 173-180.	
Usually entered at rules in V. S. C. 70; in U. S. S. C. 265.	
Issue taken on, 71; how tried, 71.	
Set down for argument, 71.	
General nature of, 111; proper defence for, 112; not of necessity a single fact, 112.	
Affirmative states matter not apparent on the bill, 113; general rule 113; exceptions, 113.	
Negative denies the truth of statements contained in the bill, 113; the latter allowed, 113.	
Anomalous 114; nature of, 114.	
In general must reduce the issue to a single point 115; double plea bad, except by leave, 114; rule does not preclude several pleas to different parts of bill, 114.	
When to be supported by answer and nature thereof, 116; in U. S. C. C. 116.	
May be to the relief, the discovery or both, 117; to jurisdiction of the court; to the person of plaintiff or defendant; in bar of suit; to the bill, 118.	
To original bill for relief, 118; to original bill for discovery, 119; to bills not original, 130.	
Title of, 120; how introduced, 121; extent of, 122; in E. C. U. S. C. C. and V. C. C. 123; matter relied on and averments, 124; answer, 125; signature, 126; special rules, 127.	
Form of, 128.	
When sustained and overruled, 129, - - -	227
Procedure on, 131, - - -	401
When filed, course of plaintiff, 175; in case of neglect by plaintiff, 176.	
When overruled in U. S. C. C. 177; in V. S. C. 177, 180.	
When sustained, 178; in U. S. C. 178; in V. S. C. 178.	
When issue is taken on, in V. S. C. 179; in U. S. S. C. 179.	
Certificate of counsel to, necessary in U. S. C. C. 276.	
Practical notes on attachments in equity, - - -	376
Practical notes on bail in equity, - - -	377
PRACTICAL NOTES ON BILLS, - - -	359, 377
For foreclosure of mortgage, - - -	356, 362, 493
Specific performance, - - -	362, 364
Discovery, - - -	364
Injunction to judgments at law, - - -	364, 366
Injunction to restrain tenant for life from carrying away slaves, - - -	366
Injunction to restrain waste, - - -	367
Injunction to stop or prevent a nuisance, - - -	367, 8
Injunction to prevent irreparable mischief, - - -	368
Account, - - -	368
Dower, - - -	368
Partition, - - -	368, 492
In cases of fraud, - - -	368, 9, 370
" mistake, - - -	370

sec. 9; also, by person having a claim against the commonwealth, chap. 46, sec. 1, Code of Virginia.

	PAGE
PRACTICAL NOTES ON BILLS (cont'd) accident,	370
" trusts,	371
" wills,	371
" assets of decedents,	371
" partnership,	372
" suretyship,	372
" assignment,	373
" set-off,	373
In suits for freedom,	374
In suits by husband and wife,	374
In cases of infants,	375
In cases of idiots and lunatics,	375
In suits by or against commonwealth, &c.	376
In suits to settle boundaries,	376
<i>Quia timet</i> ,	376
Of peace,	376
PRACTICAL NOTES ON DECREES. See Decrees, pp. 437, 445; also	
pp. 449, 451, 452, 453, 455, 457.	
For accounts generally,	437
For accounts of executors, &c.	437, 442, 445
For accounts of guardians,	442
For accounts of trustees,	445
For partition,	447, 449, 451, 491
For foreclosure of mortgages,	452, 3, 455, 457
Concerning injunctions,	464, 5
Concerning husband and wife,	468, 9
Concerning wills,	471
For specific performance,	471
Prayer for process in bills—see BILLS.	
Prayer for relief in bills—see BILLS.	
PROCEEDINGS AT RULES—in Virginia State Courts, 67, 81, 87, 91.	
pp. 402, 406.	
In U. S. C. Courts, 92.	
Process—Mesne, in U. S. C. Court,	409, 10, 418
In V. S. C.,	410, 418
<i>Final</i> , in U. S. C. C. and V. S. C.	486, 489
Process of contempt in Virginia State Courts, 82, 86,	413, 18
In U. S. C. Courts,	418
Proclamation—attachment with,	414
Production of books, papers, &c., before commissioner required, 341.	
Publication—see Order of Publication.	
<i>Quia timet</i>—bill,	376
Rebellion, writ of,	415
Receivers, 397.	
Record, matters of—when evidence, 206.	
Records, printing of,	305
Redemption—Equity of,	361, 454
Re-examination of witnesses, 232	
Reference of accounts to masters or commissioners, and proceedings	
under same,	335, 346
See Accounts.	
Re-hearing of cause, 260, 261.	
Rejoinder to replication out of use, 185.	
Release of errors at law—directed on granting injunction, 409.	
Relief—prayer for—see BILLS.	
Removal of cause, x. note (4.)	481, 475, 476
REPLICATION—special, out of use, 181; by what their place sup-	
plied, 181.	
General, 181; form of, 181.	

REPLICATION, (cont'd.)

- Plaintiff in V. S. C. not compelled to file, 182, 181.
- Plaintiff in U. S. C. C. should file, 182; consequence of not filing replication or exceptions, 182.
- Proper time to file replication, 183, 184.

Reports—see Commissioners, Notice.

- Of masters, &c. how made up and returned in V. S. C. 347; in U. S. C. C. 348.
- Papers, &c. not to be copied in report to V. S. C. 347; such matter expunged at commissioners costs, 347.
- To U. S. C. C., master not to state or recite affidavits, depositions, &c. 348; mode of reference thereto, 348.
- Exceptions to*, nature of exceptions, 351; who may file exceptions, 351; may be taken in V. S. C. either in court or in commissioners' office, 349; in U. S. C. C. to be filed in the clerk's office, 349; if exceptions overruled in U. S. C. C. party excepting to pay costs to other party, 350.
- In V. S. C. do not stand confirmed as of course, 349.
- In U. S. C. C. if exceptions not filed, within one month after return of report, report stands confirmed, 349.

Review—bills of, 463, 472.

- Defence to bills of review, 473, 475.
- Affidavit to bills of review, 466, - - - 318

Revival of suit—when necessary, 88, 89,

- By scirefacias, 88, 89, 90.
- Form of scirefacias, - - - 409, 410

Revivor—bills of, 368.

- Bill of revivor and supplement, - - - 351
- Form of bill of revivor, - - - 351

Rule on plaintiff to mature his cause, 76.

Rule to plead—when given in V. S. C. 68.

Rules—of practice, adopted by U. S. Supreme Court for conduct of

- causes in equity in the U. S. Circuit Courts, - 219, 242
- In clerk's office in Virginia State Courts, 6, - 402, 6

Sale—order for, - - - 448

Scandal and impertinence in bills, 20; in answers, 146. See *Exceptions*.

Scirefacias—writ of. See *Revival*.

Sequestration—writ of, 81, - - - 416

- When ordered, - - - 413

Set for hearing—suit, by defendant, 76.

Set-off, practical notes on, - - - 373

Settlement of boundaries, - - - 376

Slaves—see FREEDOM.

Special Court of Appeals—jurisdiction of, 287.

Special relief—prayers for, - - - 356, 9

Specific performance—practical notes to bill for, - 362, 364

Statements in bills, - - - 353, 4

Stating part of bill, 34, 41.

Subpoena—in United States Circuit Courts, - - - 409

- How and by whom served, 266, 269.
- Memorandum at bottom of, 268.
- May be sued out separately or otherwise, 267.

Suit in equity—how instituted in English courts, 1; in V. S. C. 1;

- in U. S. C. C. 1.
- Abatement of, at rules, in V. S. C. 7, 10.
- Dismissal of, at rules, in V. S. C. 7, 8, 9.

- Memoranda for, - - - 402, 403

	PAGE
SUIT IN EQUITY, (cont'd.)	
When suit in equity in V. S. C. may be set for hearing by defendant, 76.	
When such suit may be heard, though not ready as to all the defendants, 76.	
How suit in equity defended, 93, 166.	
By demurrer, 97, 110.	
By plea, 111, 131.	
By answer, 132, 158.	
By disclaimer, 159, 164.	
By cross bill, 166, 451, 462.	
When these defences may be joined in V. S. C. 165.	
Filing of demurrers, pleas, &c. 167, 194.	
Summons—in V. S. C. 2.	410
How executed, 3, 4.	
How executed on a corporation, 5.	
How executed on husband and wife, <i>note</i> (3) to sec. 3.	
Supplemental answer, 154, 378.	
Supplemental bills—when defects in suit may be cured by exhibition of, 354, 361, 362, 364.	
Will not be allowed to introduce a completely new case, nor to add to the decree what upon hearing the court has excluded from it, 363.	
What species of facts render supplemental bills necessary, 364.	
When such bills unnecessary, may be demurred to, 364.	
Not used when plaintiff has assigned his whole interest, or been deprived of it by subsequent event, 364; in such case, <i>original bill in nature of supplemental bill</i> required, 365, and <i>note</i> (18.)	
What supplemental bills should state, 366.	
Exception as regards U. S. C. C. note (19) to sec. 366.	
When supplemental bill may be exhibited by plaintiff in original suit against a single defendant, (without uniting other defendants to original bills,) 366.	
What answer supplemental bills generally calls for, 366.	
To file supplemental bill in U. S. C. C. special leave, after due notice necessary, 367; in V. S. C. no leave required, 367.	
Surcharge and falsification—see Accounts.	
Suretyship, practical notes on,	372
Taking bill for confessed, 69, 272.	
Testimony—see Depositions.	
Trusts—Practical Notes on,	371
United States Courts—see "RULES OF PRACTICE, &c." "Proceedings at Rules," "Appeals," "Decrees," "Process," "Depositions."	
Unknown defendants—how proceeded against, 78, 81.	
Venditioni exponas—form of,	489
Vendor and vendee—see specific performance.	
Widow—see Dower.	
Wills—decree construing,	469
Witnesses—examination of before masters or commissioners, 342.	
May be summoned by master or commissioner, in V. S. C. 343.	
How summoned before master in U. S. C. C. 343.	
Failing to attend, or refusing to testify, fact reported to court, which will compel attendance and testimony by process of contempt, 344, 345; special limitation as regards V. S. C. 345.	
Writs—see Process.	
Writ of assistance—319, 323.	
Form of,	487

ERRATA ET CORRIGENDA.

- §. 6, (p. 4,) l. 6, for *courts* read *events*.
 §. 57, (p. 23,) l. 10. for *course*, read *costs*.
 §. 78, (p. 32,) l. 21, after *unknown*, insert *on affidavit to that effect*.
 §. 80, (p. 32,) l. 1, after *week* insert *for four successive weeks*.
 §. 112, (p. 51,) l. 4, for *bill* read *plea*; do. 8th l. for *they* read *the plea*.
 Note* to s. 118, (p. 56,) 19th l. read liability of the *defendant* to be sued.
 Notes 74 and 80, on p. 65, should be struck out.
 §. 261, (p. 125,) 15th l. for *arrested* read *corrected*.
 §. 199, (p. 86,) 14th l. strike out *he*.
 §. 78 and 80, (p. 32,) notes 18, 20, for *chapter 171* read *chapter 170*.
 Note (a,) p. 320, for *more than one defendant* read *two or more defendants*.
 No. 5, p. 422, for *de bene eses* read *de bene esse*.
 No. 9, p. 477, 3rd l. after *infant*, insert (*or insane*.)
 No. 31, p. 483, 7th l. J. W. H., should read J., W., & H.
 No. 32, p. 483, 6th l. J. W. R., should read J., W., & R.
 §. 176, (p. 75, 6.) The omission noted has been supplied in effect by Code of Virginia, chap. 171 §§. 4th and 5th, the latter of which declares among other matters, "that if the plaintiff shall at any time after the defendant's appearance, fail to prosecute his suit, he shall be nonsuited, and pay the defendant, besides his costs, five dollars." Before such dismissal, a rule will be necessary. See § 4.
 §. 180. For 177th section read 178th section.
 §. 255. 10th l. for *the Vice Chancellor*, read *a Vice Chancellor*.
 P. 360, 14th l. from the bottom, for *mortgagee* read *mortgagees*.
 P. 364, 6th. line from bottom, for *were* read *are*.
 P. 371, 2nd. line from bottom, for *real* read *legal*.





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